Supreme Court, U.S.
FILED

95136 8 FEB 26 1996

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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DONNA SACCOCCIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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90 pp

QUESTIONS PRESENTED

I. Whether this Court Should Review the Unprecedented Holding of the First Circuit that the Government May Prosecute a Defendant for Predicate Offenses which the Swiss Supreme Court has Held Would Violate the U.S.-Swiss Extradition Treaty Warrants Review.

II. Whether the First Circuit Erred in Construing this court's Ruling in Ratzlaf v. United States as Permitting Conviction for a Defendant's Reckless Disregard of the Currency Reporting Laws Warrants Review.

III. Whether a Dog Alert to Currency Constitutes Admissible Evidence that the Currency Was In Fact Derived from Drug Dealing for Proving a Money Laundering Offense Warrants Review.

IV. Whether RICO's Criminal Forfeiture Provisions Authorize the Imposition of Forfeiture Upon a Defendant Who Never Obtained any Proceeds Based Solely Upon a Claim of Joint and Several Liability with Unindicted Co-Conspirators Warrants Review.

V. Whether an Unrebutted Diagnosis of Incompetency Coupled with Other Objective Evidence of Incompetency is Sufficient to Trigger a Right to a Competency Hearing Under 18 U.S.C. § 4241 Warrants Review.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION OF THE COURT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF FACTS 4

ARGUMENT 8

I. This Court Should Review the Unprecedented Holding of the First Circuit That the Government May Prosecute a Defendant for Predicate Offenses Which the Swiss Supreme Court Has Held Would Violate the U.S.-Swiss Extradition Treaty 8

II. The First Circuit's Refusal to Follow this Court's Holding In Ratzlaf Warrants Review 15

III. The Court of Appeals Erred in Holding that Dog Alerts on Currency are Admissible Evidence of a Connection Between Currency and Drug Transactions, and In Sustaining the Trial Court's Refusal to Allow Defendant to Confront the Government's Evidence By Establishing the Widespread Contamination of Currency 20

IV. Whether A Defendant Can Be Held Vicariously Liable in Criminal Forfeiture For Monies Allegedly Obtained by Non-Defandants is an Important and Unprecedented Issue Which Warrants Review 23

V. This Court Should Grant Review Over the Issue of Whether an Unrebutted Diagnosis of Incompetency is Sufficient to Establish the Probable Cause Needed to Trigger a Competency Hearing Under 18 U.S.C. §4241 or Due Process 25

Conclusion 29

TABLE OF AUTHORITIES

Pages

CASES

Brauch v. Raiche, 618 F.2d 843 (1st Cir. 1980) . . . 12

James v. Cain, 50 F.3d 1327 (5th Cir 1995) 19

Jones v. United States Drug Enforcement Admin., 819F. Supp. 698 (M.D.Tenn. 1993) 19, 21

Nutter v. White, 39 F.3d 1154(11th Cir. 1994) . . . 19

Pinkerton v. United States, 328 U.S. 640 (1946) . . . 24

Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) . . 14

Ratzlaf v. United States, 114 S. Ct. 615 (1994) . *Passim*

Rose v. United States, 513 F. 2d 1251, 1255 (8th Cir. 1975) 28, 29

Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) 19

United States v. Aversa, 984 F.2d 493 (1st Cir. 1993)(en banc), vacated,114 S. Ct. 873 (1994) . 17, 18

United States v. Bencs, 28 F.3d 555 (6th Cir. 1994) 17, 19

United States v. Billingsley, 766 F. 2d 1015, 1022 (7th Cir. 1985) 27, 29

United States v. Carr, 25 F.3d 1194 (3rd Cir. 1994) 21, 22

Table of Authorities Continued

Pages

United States v. Caporale, 806 F. 2d 1487, 1507 (11th Cir. 1986) 24

United States v. Crews, 781 F. 2d 826, 833 (10th Cir. 1986) 28

United States v. Curran, 20 F.3d 560 (3rd Cir. 1994) 18

United States v. Garza, 42 F.3d 251 (5th Cir. 1994) 17, 19

United States v. Gaudin, 28 F.3d 943 (9th Cir. 1994), affirmed, 115 S. Ct. 2310 (1995) 19

United States v. Hove, 52 F.3d 233 (9th Cir. 1995) 17, 18, 19

United States v. Herbage, 850 F.2d 1463 13

United States v. Hurley, 63 F.3d 1 (1st Cir. 1995) . . . . . *Passim*

United States v. Jones, 21 F.2d 165 (7th Cir. 1994) 19, 21

United States v. Khan, 993 F.2d 1368 (9th Cir. 1993) 12

United States v. London, 66 F.3d 1227 (1st Cir. 1995) 17

Table of Authorities Continued

Pages

United States v. Makris, 535 F. 2d 899, 906 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977) . . 27-28, 29

United States v. Manzella, 791 F. 2d 1263, 1268-69 (7th Cir. 1986) 25

United States v. Masters, 924 F. 2d 1362, 1370 (7th Cir.), cert. Denied, 500 U.S. 919 (1991) 24

United States v. Nicholson, 550 F.2d 502 (8th Cir. 1977) 27, 29

United States v. $53,082 in U.S.Currency, 16 F.2d 245 (6th Cir. 1993) 21

United States v. $191,910,000 in U.S.Currency, 16 F.3d 1051 (9th Cir. 1994) 21

United States v. Retos, 25 F.3d 1220 (3rd Cir. 1994) 19

United States v. Rogers, 18 F.3d 265 (4th Cir. 1994) 19

United States v. Saccoccia, 58 F.3d 754(1st Cir. (1995) . . . . . *Passim*

United States v.Van Cauwenberghe, 827 F.2d 424 (9th Cir. 1987) 14

United States v. Young, 470 U.S. 1, 15-16 (1985) . 22

Table of Authorities Continued

Pages

White v. United States, 470 F. 2d 727, 728 5th Cir.) 27, 28, 29

Treaty on Extradition, May 14, 1900, U.S.-Switzerland, 31 Stat. 1928 . . . . . 8, 9, 14

STATUTES

18 U.S.C. § 1956 . . . . . 4, 13, 20

18 U.S.C. § 1963(a) 4

18 U.S.C. § 4241 6,26

31 U.S.C. §§ 5322 & 5324 . . . . . 4, 8, 15

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OPINIONS BELOW

The opinion of the First Circuit Court of Appeals below is reported as United States v. Hurley, 63 F.3d 1 (1st Cir. 1995).

JURISDICTION OF THE COURT

The judgment below was entered and filed in July 24, 1995, and reconsideration was denied on September 27, 1995. On December 12, 1995, this Court granted petitioner's motion for an extension of time in which to file a petition for certiorari until February 24, 1996. Accordingly, this Court has jurisdiction to issue the writ of certiorari under 28 U.S.C.§ 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, norbe deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall haveb e e n committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1956 states in relevant part:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or conducts such a financialtransaction which in fact involves the proceeds of specified unlawful activity-- . . . .

shall be sentenced to a fine . . . or imprisonment for not more than twenty years, or both.

31 U.S.C. § 5322 states in relevant part:

A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . shall be fined not more than $250,0000, or imprisoned for not more than five years, or both.

31 U.S.C. § 5324 states in relevant part:

(a) Domestic coin and currency transactions.--No person shall for the purpose of evading the reporting requirements of section 5313(a) or 5325 or any regulation prescribed under any such section--

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a) or 5325 or any regulation prescribed under any such section

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) or 5325 or any regulation prescribed under any such section that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attemp to structure or assist in structuring, any transaction with one or more domestic financial institutions.

18 U.S.C. § 1963 states in relevant part:

(a) Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States, irrespective of any provision of State law--

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

STATEMENT OF FACTS

On November 18, 1991, Petitioner Donna Saccoccia ("Defendant") was indicted along with several other defendants including her husband, Stephen Saccoccia, in a 152 count indictment. A superseding indictment was returned on July 22, 1992 alleging a conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1956 & 1957; failing to file currency transaction reports (CTRs), filing false CTRS, and structuring transaction to evade currency transaction reporting obligations (structuring), in violation of 31 U.S.C.§§ 5322 & 5324; Travel Act violations, 18 U.S.C. § 1952; and criminal forfeiture pursuant to 18 U.S.C. §§ 982 & 1963.

At the time of the indictment, Donna Saccoccia was traveling in Switzerland, and the United States government thereafter initiated formal extradition proceedings in Switzerland. The highest Swiss court, the Swiss Federal Tribunal, ruled in the summer of 1992 that the RICO conspiracy charge in Defendant's indictment was a proper basis for extradition as Switzerland had a conspiracy crime but concluded that the structuring and CTR charges were not because Switzerland had no analogous crime. Thereafter, Donna Saccoccia and her husband were extradited to the United states. At her arraignment in the District of Rhode Island, defense counsel refused to enter a plea on Defendant's behalf in order not to waive her claim that she could not be

tried for any CTR-related offense. Tr. July 23, 1992, at 12-13. In addition, defense counsel alerted the magistrate that he had observed a "marked deterioration in [Donna Saccoccia's] mental status." July 23, 1992, at 27-28.

A six-week jury trial commenced on November 4, 1992 in the Rhode Island District Court (the Honorable Torres, J.). The trial of Defendant's husband, Stephen Saccoccia, was severed and he was tried on the same indictment in February 1993.

The gravamen of the government's case was that defendant Stephen Saccoccia engaged in money laundering of monies derived from drug dealing through his gold and currency exchange businesses. The government acknowledged at trial that the currency exchange businesses involved did a substantial amount of legitimate business, but it contended that a portion of the business involved money laundering. The defendants were either Stephen Saccoccia's relatives or employees of the exchange businesses. Part of the burden assumed by the government in pressing the money laundering charges was to establish that the monies which were "laundered" were, in fact, derived from drug transactions. To satisfy this burden, the government introduced evidence, over defendant's objections, that a narcotics detection dog alerted to a bank burlap bag containing several thousand dollars recently deposited by a defendant at the Fleet National Bank in Providence, Rhode Island. When defense counsel then attempted to underscore the unreliability of this evidence by eliciting from the dog's handler, Seargent Conley, that the majority of United States currency contains traces of cocaine residue, the district court sustained government objections to this line of cross-examination.

Defendant was convicted on all counts. The Probation Office issued a presentence report in which a probation officer noted "it seems apparent that the defendant's mental capacity is diminished." Thereafter, defense counsel moved for a competency hearing pursuant to 18 U.S.C. § 4241, and submitted the diagnosis of an experienced psychologist, Dr. John Cegalis, that defendant was not competent to be sentenced, and raising doubt about whether she was competent to be tried. The District Court denied the Motion for a competency hearing.

Defendant was sentenced to fourteen years in prison, and $136 million in criminal forfeitures, a sum which represented the amount of money which the government contends was obtained by unindicted Columbian drug dealers who laundered money through the currency exchanges. Although there was no evidence that Donna Saccoccia obtained any of this money, the court ordered this amount of money criminally forfeit on the theory that Defendant was jointly and severally responsible for the forfeiture of gross amounts allegedly obtained by unindicted and unnamed co-conspirators in Columbia. The length of Defendant's sentence under the Sentencing Guidelines was principally dictated by two factors, the base level for the money laundering convictions which in turn were predicated upon CTR violations, and the amount of the loss, which was pegged at the $136 million figure allegedly obtained by unnamed Columbian co-conspirators.

During Donna Saccoccia's trial, Swiss authorities expressed concerns to the Justice Department about the use of CTR offenses in the prosecution of the Saccoccias. On December 1, 1992, the Justice Department responded to the

Swiss authorities in a letter assuring the Swiss that the trial prosecutors would not present evidence of currency structuring violations, and that there was "no possibility under American law that the SACCOCCIAs could be convicted of those charges without the consent of the Swiss government." O'Hare Letter of December 1, 1992., App. 50a.

Near the conclusion of the trial of Defendant's husband, Swiss authorities again contacted the Justice Department and expressed concerns that Stephen Saccoccia could be convicted on the RICO and Travel Act charges based solely on the CTR-related predicates offenses, the offenses which the Swiss Federal Tribunal had preciously ruled were not the proper subjects of extradition. The prosecutors notified the trial court of this Swiss inquiry, and told the Court that continued prosecution under the Indictment may "very well be a violation of the [Swiss] treaty." Tr. Mar. 9, 1993, at 2. The government then asked the Court to redact the Indictment to eliminate all references to CTR violations as well as to instruct the jury that they were to disregard the CTR evidence. The trial court did so. Stephen Saccoccia was convicted on all counts.

On appeal, the First Circuit ruled that Donna Saccoccia's conviction of RICO and money laundering charges predicated upon CTR violations did not violate the U.S.-Swiss extradition treaty or the ruling of the Swiss Federal Tribunal, that defendant's conviction on the structuring charges was not error under this Court's opinion in Ratzlaf v. United States, 114 S. Ct. 615(1994) which required that a jury find that defendant had knowledge of the illegality of structuring because a "reckless disregard" of the

structuring laws is sufficient to satisfy this willfulness standard, the trial court properly denied Defendant's motion for a competency hearing, and no error occurred in the admissibility of the dog alert upon the currency in the bank burlap bag.

ARGUMENT

I. This Court Should Review the Unprecedented Holding of the First Circuit That the Government May Prosecute a Defendant for Predicate Offenses Which the Swiss Supreme Court Has Held Would Violate the U.S.-Swiss Extradition Treaty.

Petitioner Donna Saccoccia was indicted, convicted, and sentenced upon RICO conspiracy and numerous substantive money laundering charges which were expressly predicated upon alleged violations of the currency structuring laws, 31 U.S.C. §§ 5322, 5324. The Government, however, had procured Mrs. Saccoccia's presence in this country for this prosecution through formal extradition proceedings initiated in Switzerland. During the extradition process, the Swiss Federal Tribunal ruled that Switzerland did not have any crime analogous to the American currency structuring laws, and accordingly ruled that prosecution of Mrs. Saccoccia for that offense would violate the U.S-Swiss treaty. The U.S. Swiss Treaty embodies the principle of dual criminality which limits extradition to offenses which are crimes in both countries. Treaty on Extradition, May 14, 1900, U.S.-Switz., 31 Stat. 1928, 1932, art. II ("Treaty"). United States v. Saccoccia, 58 F.3d 754, 766 (1st Cir. 1995).

Despite this ruling, the government thereafter prosecuted Donna Saccoccia using currency transaction

reporting offenses as predicate offenses for the RICO conspiracy and money laundering offenses. The currency transaction offenses were also taken into account in calculating the length of defendant's sentence, and the amount of criminal forfeiture imposed.

On appeal to the First Circuit, the panel opinion concluded that Donna Saccoccia's extradition claims were satisfactorily rejected in the panel's earlier resolution of the similar, but substantially less compelling, extradition claims of her husband. United States v. Hurley, 63 F.3d 1, 24 (1st Cir. 1995),App. 49a, (referring to United States v. Saccoccia, 58 F.3d 754, 754-69 (1st Cir. 1995).[1] Petitioner's husband,

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[1] The First Circuit also made a passing reference to a possible waiver of treaty rights by Mrs. Saccoccia. The U.S-Swiss Treaty, however, categorically states that "No person surrendered by either of the Contracting States to the other shall be prosecuted or punished for any offense committed before the demand for extradition, other than that for which extradition is granted, unless he expressly consents to it in open Court, which consent shall be entered upon the record. . . ." Treaty, 31 Stat. 1928, 1932, art. IX (emphasis added). There is no such consent by Mrs. Saccoccia or her counsel in the record of this case. To the contrary, Mrs. Saccoccia, upon advice of counsel, refused to enter a plea to the charges in this case at her arraignment for the precise purpose of "not waiving her rights" under the Swiss ruling and preserving her claim that the prosecution violated the Treaty. Tr. July 23, 1992, at 12-13. The arraigning magistrate confirmed that "your entering of a plea of not guilty with respect to each and every count of the indictment, does not constitute an acknowledgment, or an acquiescence of being held chargeable with respect to those offenses which are not – which are not extraditable." Tr. July 23, 1992, at 13. See also Tr. September 28, 1992, at 66 (defense counsel asserts that references in counts must be redacted because of extradition ruling); Tr. October 29, 1992 (defense counsel argues that remaining CTR references in Indictment should be redacted). During Mrs. Saccoccia's trial, unlike the later trial of her husband, the government contended that CTR offenses could be used as predicate

Stephen Saccoccia, had also been extradited from Switzerland for prosecution on the same indictment, but he was tried and convicted in a later trial. During Mrs. Saccoccia's trial, but prior to her husband's, the Justice Department responded to Swiss inquiries about the whether the defendant could be convicted of RICO conspiracy solely by reference to currency structuring violations by assuring the Swiss that the trial prosecutors would not present evidence of currency structuring violations. Indeed, the U.S. authorities told the inquiring Swiss officials the failure to delete the Saccoccias from the counts of the superseding indictment was inadvertent and due to the lack of familiarity of the trial prosecutor with extradition law. O'Hare Letter of December 1, 1992., App. 50a, The Justice Department informed the Swiss that the prosecutors "would present no evidence regarding the guilt of the SACCOCCIAs on the charges for which extradition was not granted." Id. The Justice Department assured the Swiss that "Even though the superseding indictment includes the charges for which extradition was not granted, there is no possibility under American law that the Saccoccia's could be convicted of those charges without the consent of the Swiss government." Id. Despite these assurances, the government used currency structuring violations as predicate offenses for the RICO conspiracy and money laundering offenses for which she was convicted, and also in connection with defendant's sentencing. During Mr. Stephen Saccoccia's later trial on RICO, money laundering, and Travel Act offenses

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offenses notwithstanding the ruling of the Swiss Federal Tribunal. Tr. October 29, 1992, at 24.

which relied upon currency violation predicates, the Swiss again contacted the Justice Department about compliance with the ruling of the Swiss Federal Tribunal. Near the end of Mr. Saccoccia's trial, the prosecution announced to the court that the Swiss were inquiring about whether Mr. Saccoccia could be convicted solely by the use of structuring crimes as predicate offenses. The trial prosecutors then indicated to the trial court that the use of structuring offenses as predicates may "very well be a violation of the [Swiss] treaty." Tr. Mar. 9, 1993, at 2. The prosecution immediately asked the trial court to redact all references to currency structuring violations from the indictment, and further obtained a jury instruction that the jury was not to consider currency structuring violations as predicate offenses. Saccoccia, 58 F.3d at 765. The government acknowledged to the trial court that its request was prompted by the recent inquiry from a responsible Swiss official about the potential that Mr. Saccoccia could be convicted of RICO conspiracy based solely upon currency structuring offenses notwithstanding the prior ruling of the Swiss Federal Tribunal. Id.

The First Circuit rejected the treaty claim of Mr. Saccoccia, finding that "it would have been perfectly proper for the government to seek convictions on those counts based on CTR predicates." Saccoccia, 58 F.3d at 769. The First Circuit concluded, however, the government's redaction of the indictment, and request for a jury charge to disregard the CTR allegations "avoided any potential intrusion on the principles of either dual criminality or specialty." Saccoccia, 58 F.3d at 768.

No such prophylactic measures, however, were taken in the earlier trial as to Mrs. Saccoccia, who was tried, convicted, and sentenced based upon currency violation predicate offenses. The First Circuit's rejection of her treaty violation claim, then, rested upon its unprecedented legal conclusion that currency reporting offenses could be used as predicate offenses for the RICO conspiracy and money laundering charges, notwithstanding the contrary ruling of the Swiss Federal Tribunal that currency reporting violations are not extraditable offenses under the U.S.-Swiss Treaty. This was error of potentially drastic proportions which warrants this Court's review.

A. The Principles of Dual Criminality Are Violated By the Use of Non-Extraditable Offenses as Predicate Offenses

Dual criminality requires that "the acts upon which the [requesting state's] charges are based are proscribed by similar provisions of" the extraditing state. United States v. Khan, 993 F.2d 1368, 1372 (9th Cir. 1993); Brauch v. Raiche, 618 F.2d 843, 847 (1st Cir. 1980). Here, there is no issue remaining as to whether currency reporting violations are crimes under Swiss law or are the proper subject of extradition under the Swiss-U.S. treaty--the Swiss Federal Tribunal has conclusively ruled that CTR violations are not crimes in Switzerland and it further refused to authorize extradition of petitioner on CTR offenses. The only remaining issue is whether the government can circumvent this ruling and its treaty obligations to the Swiss and other treaty partners, by simply using non-dual offenses as predicate offenses.

As this Court is undoubtedly aware, many federal criminal statutes, including the RICO, Travel Act, and money laundering statutes, are defined in relation to the commission of subsidiary, predicate criminal offenses. See, e.g., 18 U.S.C. § 1961(a); 18 U.S.C. § 1952(b); 18 U.S.C. § 1956(c)(7). The money laundering statutes, for example, list dozens of federal crimes which may form the basis of a money laundering offense. See 18 U.S.C. § 1956(c)(7). The enactment of such criminal legislation, and the increasing frequency of such criminal prosecutions, virtually assures that the issue of whether our government will circumvent extradition rulings of foreign governments by casting non-dual offenses as predicate offense will be a recurring issue of concern to foreign governments and defendants alike. The government's solemn treaty obligations to honor the dual criminality doctrine would be eviscerated if the government could prosecute an extradited person for non-dual offenses through the simple device of charging non-indictable offenses as predicate offenses.

Especially where, as here, the treaty partner has clearly spoken, and indeed has repeatedly intervened with the Justice Department, the case is compelling that the government should not be permitted to do indirectly that which it is prohibited by treaty from doing directly.

B. The Principles of Specialty Are Violated By the Use of Non-Extraditable Offenses as Predicate Offenses

The Rule of Specialty is a corollary to the dual criminality doctrine, United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir. 1988), cert. denied, 489 U.S. 1027

(1989) (citing M. Bassiouni, International Extradition: United States Law and Practice, vol 1, ch. 7, § 4.1, at 328 (2d rev. ed. Nov. 1987)). The specialty doctrine "'prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite.'" United States v.Van Cauwenberghe, 827 F.2d F.2d 424, 428 (9th Cir. 1987) (quoting Quinn v. Robinson, 783 F.2d 776, 783 (9th Cir.), cert. denied, 479 U.S. 882 (1986)).

The relevant intent here is that of the Swiss: Did the extraditing country intend to permit the prosecution of Donna Saccoccia of currency structuring offenses as predicates?[2] The First Circuit relied exclusively upon the fact that the Swiss Federal Tribunal granted extradition upon the RICO conspiracy charges to conclude that the Swiss had endorsed the use of currency violations as predicate offenses. Saccoccia, 58 F.3d at 768. The problem with this logic, however, is that it overlooks what the Swiss Federal Tribunal simultaneously did--rule that CTRS are non-extraditable offenses--and ignores the limited issue actually decided by the Swiss tribunal--whether the RICO conspiracy statute is, in general, paralleled by similar Swiss conspiracy statutes.

The Swiss Federal Tribunal's finding that RICO conspiracy charges are sufficiently similar to Swiss conspiracy crimes that extradition is warranted must be

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[2] Article IX of the U.S-Swiss Treaty expressly incorporates the specialty doctrine, and specifies that "No person surrendered by either of the Contracting States to the other shall be prosecuted or punished for any offense committed before the demand for extradition, other than that for which extradition is granted."

reconciled with its simultaneous ruling that CTR offenses are not extraditable offenses. If the issue boils down to whether the Swiss would authorize extradition for conspiracy to commit a non-extraditable offense, the most plausible inference of Swiss intent would be in the negative: how can one conspire to commit a non-offense? Moreover, abundant other evidence available to the First Circuit, ranging from the assurances of the American government to the Swiss to the subsequent intervention of the Swiss in Mr. Saccoccia's trial, and concluding with what the First Circuit characterized as the "fumigation of the indictment" by the trial judge at the subsequent trial of Mr. Saccoccia, all point to the same conclusion--that the Swiss intended that this should not happen. Saccoccia 58 F.3d at 768.

Accordingly, this Court should grant review to assure that the treaty obligations of the government are not circumvented, and to give needed guidance to defendants, treaty parties, and the government as to whether extradition for non-extraditable offense for use as predicate criminal charges violates either the dual criminality or speciality doctrines.

II. The First Circuit's Refusal to Follow this Court's Holding In Ratzlaf Warrants Review

The government prosecuted Mrs. Saccoccia for RICO conspiracy and money laundering offenses which were predicated upon claims that she engaged in the unlawful structuring of currency transactions ("CTRs), in violation of 31 U.S.C. §§ 5322, 5324. The trial court gave a willfulness instruction on the structuring charges which did not expressly place upon the government the burden of proving that

defendant had subjective knowledge that the law criminalized structuring, as required by this Court in Ratzlaf v. United States, 114 S. Ct. 615 (1994). Accordingly, petitioner argued on appeal that her conviction must be reversed because the jury did not make a necessary finding on an essential element of the government's case. The First Circuit held that the instruction was neither erroneous, nor plain error, and petitioner respectfully submits that the Court erred in both respects.

This Court, in Ratzlaf, held in unmistakable terms, that to convict a defendant for illegal structuring of currency transactions "the jury had to find that he knew the structuring in which he was engaged was unlawful." Ratzlaf, 114 S. Ct. at 663. In Ratzlaf, the defendant had made multiple bank deposits of gambling winnings at the suggestion of a casino in order to avoid the minimum $10,000 deposit amount which would trigger a currency reporting obligation. The government established that defendant knew of the reporting laws, but this Court held that this was insufficient to establish that defendant "willfully" violated the currency structuring laws. Rather, applying tradition statutory construction principles, including the principle of lenity, this Court held that the government must prove, and the jury find, that the defendant had subjective knowledge that splitting transactions in order to avoid currency reporting obligations was a crime.

Here, the jury was not given any intent instruction specific to the currency transaction charges, but rather a general willfulness instruction which told the jury it could convict the defendants by finding that "a Defendant acted with the purpose of either disobeying or disregarding the law." Tr. December 15, 1992, at 64-65. When this

instruction was challenged on appeal, the First Circuit held that the Ratzlaf opinion did not "insist on actual knowledge and nothing less," to prove a structuring violation, although the First Circuit suggested that this Court might make such a ruling if the Court revisited the issue. Hurley, 63 F.3d at 14, App. 23a. Instead, the First Circuit sustained the charge as not erroneous on the basis of pre-Ratzlaf caselaw in the First Circuit which had held that willfulness could be established by (1) actual knowledge, or (2) a "reckless disregard of the law." Id. (citing United States v. Aversa, 984 F.2d 493, 502 (1st Cir. 1993) (en banc), vacated, 114 S. Ct. 873 (1994).

Since this Court issued the Ratzlaf opinion, however, other federal circuits have had no difficulty interpreting this Court's ruling as requiring proof of a defendant's actual knowledge of the criminality of structuring. See, e.g., United States v. Hove, 52 F.3d 233, 235-36 (9th Cir. 1995) (Ratzlaf requires instruction that defendant had knowledge of the illegality of structuring); United States v. Garza, 42 F.3d 251, 253 (5th Cir. 1994) (Ratzlaf "cleanly rejects" jury instruction that defendant need not know of illegality of structuring); United States v. Bencs, 28 F.3d 555, 564 (6th Cir. 1994).

The First Circuit appears to stand alone in construing this Court's Ratzlaf opinion as satisfied merely by proof that a defendant "recklessly disregarded" whether structuring was a crime or not. Indeed, in United States v. London, 66 F.3d 1227 (1st Cir. 1995), Chief Judge Torruella dissented from a denial of rehearing en banc on this very issue, arguing that the "reckless disregard" standard for willfulness cannot satisfy the "clear implication, if not the plain language, of Ratzlaf." 66 F.3d at 1245 (Torruella, C.J., dissenting).

Chief Judge Torruella further observed that the First Circuit's pre-Ratzlaf opinion in Aversa, which had endorsed a "reckless disregard" alternative to the actual knowledge standard, was vacated by this Court for reconsideration in light of Ratzlaf, an act which Chief Judge Torruella noted was inconsistent with an inference that this Court had approved the "reckless disregard" standard endorsed in the Aversa opinion. Id.

This Court's definition of "willfulness" in Ratzlaf has been widely followed outside of the First Circuit not only in currency structuring cases, but also with respect to other criminal statutes in which the term "willfulness" defines the government's burden of proof on intent. See, e.g., United States v. Hove, 52 F.3d 233, 236 (9th Cir. 1995) (CTR violation); United States v. Curran, 20 F.3d 560, 568-69 (3rd Cir. 1994) (applying Ratzlaf to willfulness standard for false statements under 18 U.S.C. § 1001 and § 2(b)). Accordingly, the First Circuit's departure from the clear ruling of this Court in Ratzlaf carries the obvious, and widespread, potential to undermine the otherwise settled precedent of this Court as to the meaning of the term willfulness when it is used in criminal prosecutions of specific intent crimes. As willfulness is an element of numerous federal crimes, the impact of the First Circuit's ruling is exceptionally broad.

The First Circuit suggested in the alternative that the instructional error did not constitute plain error. The vast majority of federal circuits which have addressed this question, however, have concluded that failure to give an instruction on the essential element of intent in conformity with Ratzlaf constitutes plain error. See, e.g., United States

v. Hove, 52 F.3d 233, 236 (9th Cir. 1995); United States v. Retos, 25 F.3d 1220, 1230 (3rd Cir. 1994); United States v. Rogers, 18 F.3d 265, 268 (4th Cir. 1994); United States v. Garza, 42 F.3d 251, 253 (5th Cir. 1994); United States v. Bencs, 28 F.3d 555, 564 (6th Cir. 1994); United States v. Jones, 21 F.2d 165, 172-73 (7th Cir. 1994).

Again, the First Circuit stands largely alone in holding that the failure of the jury to find that a defendant actually knew of the illegality of structuring constitutes plain error. In United States v. Gaudin, 28 F.3d 943, 951 (9th Cir. 1994) (en banc), aff'd on other grounds, 115 S. Ct. 2310 (1995), the Ninth Circuit held that the failure to give an instruction on an essential element of the offense, after this Court's opinion in Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), must constitute plain error.

When the Gaudin case was recently before this Court, this Court reaffirmed that the Sixth Amendment guarantees a defendant a jury finding on every element of the offense. Gaudin, 115 S. Ct. at 2320. See also James v. Cain, 50 F.3d 1327, 1334 (5th Cir 1995) (Sixth Amendment error in jury instruction not subject to harmless error analysis; Nutter v. White, 39 F.3d 1154, 1157 (11th Cir. 1994). Chief Justice Rehnquist, joined by Justices O'Connor and Breyer, however, wrote a concurring opinion in the Gaudin case suggesting that this specific constitutional error, absence of a jury finding on an essential element of the offense, may not constitute plain error. Gaudin, 115 S. Ct. at 2322 (Rehnquist, C.J., concurring).

Here, the absence of a jury finding on an essential element of the government's case is the type of Sixth

Amendment error which is "structural" under this Court's teaching in Sullivan, and the overwhelming majority of circuits have, when confronted with this specific error, concluded that it constitutes plain error. Accordingly, this case presents the issue which was reserved by the concurring Justices in the Gaudin opinion--whether structural Sixth Amendment error under Sullivan can nonetheless fail to rise to the level of plain error.

III. The Court of Appeals Erred in Holding that Dog Alerts on Currency are Admissible Evidence of A Connection Between Currency and Drug Transactions, and In Sustaining the Trial Court's Refusal to Allow Defendant to Confront the Government's Evidence By Establishing the Widespread Contamination of Currency.

In this case, the government presented no direct evidence that any of the alleged $136 million in allegedly laundered monies was "in fact" derived from drug trafficking, as required under 18 U.S.C. §§ 1956 & 1957. In order to satisfy its burden, the government introduced the testimony of Sergeant Conely, a dog handler, who testified that a narcotics detection dog alerted to the presence of drugs on a bank's burlap bag which contained several thousand dollars previously deposited by defendant James Saccoccia. The defense objected to the admissibility of this testimony given the fact that the widespread contamination of currency with cocaine residue, and the routine dissemination of such residue throughout currency from mere contact, undermined the reliability of the dog alert as evidence of a connection between currency and a drug transaction. The trial court admitted the dog alert testimony over defense objections.

During cross-examination, the government's dog handler admitted that he was familiar with the law enforcement studies on the tainting of money with drugs (Tr. Nov. 17, 1992, at 46). The government successfully objected to every effort by the defense, however, to question the government witness about currency contamination. Tr. November 17, 1992, at 44-47. Hence, not only did the trial court admit inherently unreliable and prejudicial evidence in the form of the dog alert, it compounded the error by preventing the defense from confronting this evidence with the very reason why it was unreliable.

Numerous scientific and law enforcement studies have revealed that a substantial percent of U.S. currency, ranging as high as 97%, is contaminated with narcotics residue. These studies have led a growing number of federal courts to hold that a dog alert on currency is insufficient, in itself, to establish probable cause to believe that the currency was involved in a drug transaction. See, e.g., United States v. $191,910,000 in U.S. Currency, 16 F.3d 1051, 102 (9th Cir. 1994); United States v. $53,082 in U.S. Currency F.2d 245, 250 (6th Cir. 1993); Jones v. United States Drug Enforcement Admin., 819 F. Supp. 698 (M.D. Tenn. 1993) (discussing DEA's own report detailing contamination).

Indeed, as Judge Becker observed in his concurring opinion in United States v. Carr, 25 F.3d 1194 (3rd Cir. 1994):

> "It is thus my considered opinion that the fact that numerous studies by governmental and private agencies, studies whichstand unrefuted, strongly suggest that a trained canine will alert to all bundles

> of used currency does not permit the jury to draw a reasonable inference that the person in priorpossession of such currency was a drug trafficker or associated with one."

Carr, 25 F.3d at 1216 (Becker, J., concurring and dissenting).

The First Circuit's position thus stands in conflict with those of other circuits which have concluded that dog alerts on currency fail to establish probable cause that a connection exists between the currency and a drug crime, much less the much more demanding standard for evidence admissibility under Fed. R. Evid. 104.

Because of the increasing frequency with which the federal government has employed the federal money laundering statutes, and the inherently unreliable, prejudicial, and non-probative nature of a positive dog alert on currency, the issue of whether such a dog alert is admissible to satisfy the government's burden of prove that laundered monies are indeed derived from a drug transaction is both a recurring and important issue. As Judge Becker aptly observed in the Carr case, the exclusion of such evidence was needed "to protect the 'public reputation of judicial proceedings,'" Carr, 25 F.3rd at 1217 (Becker, J., concurring and dissenting) (quoting United States v. Young, 470 U.S. 1, 15-16 (1985). Accordingly, this Court should grant review of this recurring and important issue.

IV. Whether a Defendant Can Be Held Vicariously Liable in Criminal Forfeiture For Monies Allegedly Obtained by Non-Defendants is an Important and Unprecedented Issue Which Warrants Review.

The First Circuit held that defendant Donna Saccoccia was properly ordered to suffer the criminal forfeiture of $136 million by applying a vicarious liability principle to criminal forfeiture under the RICO statute, 18 U.S.C. § 1963(a). In short, Donna Saccoccia was held liable in criminal forfeiture for monies allegedly obtained by unindicted co-conspirators who, of course, were not convicted in the proceedings below.[3] Because this ruling marks such a substantial departure from the language of the criminal forfeiture laws, which limit

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[3] The Indictment alleged that defendants conspired to launder monies for Columbian drug lords. The First Circuit, after affirming the trial court's denial of a multiple conspiracy jury instruction by concluding there was sufficient evidence of a single conspiracy involving Columbian drug cartels, Hurley, 63 F.3d at 10, App. 15a made the cryptic, but wholly inaccurate, assertion that the individual defendants "are liable because their convicted American co-conspirators obtained the funds, regardless of the status assigned to the Colombians." Hurley, 63 F.3d at 22-23, App. 44a-45a. There is no evidence in this case that any of the defendants "obtained" any of the $138 million in allegedly laundered monies. According to the government, these monies were transmitted to Columbia; indeed, the single conspiracy alleged by the government (which allegedly justified the denial of a multiple conspiracy charge) was aimed at laundering drug proceeds and transmitting them back to Columbia. The only allegation made by the government in this case that any defendant "obtained" anything from the alleged scheme was an allegation, without proof, that defendant Stephen Saccoccia was supposed to earn a commission from the laundering activity. Accordingly, the First Circuit's assertion that defendant's "American co-conspirators" obtained these laundered funds is, respectfully, a complete departure from the record in this case.

forfeiture to proceeds "obtained" by the defendant, and would dramatically expand the scope of criminal forfeiture beyond the bounds set by Congress, this issue warrants the review of this Court.

The First Circuit admitted that "there is a respectable basis for holding that vicarious liability for co-conspirator behavior does not exist under section 1963." Hurley, 63 F.3d at 22, App. 43a. Perhaps the most respectable basis for such a conclusion is the language of the forfeiture statute itself, as it authorizes criminal forfeiture of "any property constituting . . . any proceeds which the person obtained . . . from racketeering activity." 18 U.S.C. § 1963(a)(3) (emphasis added). Nonetheless, the First Circuit held that the Pinkerton conspiracy doctrine, endorsed by this Court in Pinkerton v. United States, 328 U.S. 640 (1946), whereby conspirators are held vicariously liable for the reasonable acts of a co-conspirators, should be grafted upon this statutory language so as to permit the government to impose forfeiture upon a defendant of sums obtained only by unindicted co-conspirators. This was error of fundamental proportions.

In the first place, had Congress intended to authorize the application of vicarious liability to criminal forfeitures, it could have. It did not. While some courts have held that RICO defendants can be held jointly and severally liable for a forfeiture judgment amongst themselves, see, e.g., United States v. Masters, 924 F.2d 1362, 1370 (7th Cir.), cert. denied, 500 U.S. 919 (1991); United States v. Caporale, 806 F.2d 1487, 1507 (11th Cir. 1986), none have ever held, as did the First Circuit below, that a RICO defendant can be

held liable in criminal forfeiture for proceeds allegedly obtained by non-defendants.[4]

The imposition of criminal forfeiture upon a defendant for monies obtained by non-defendants constitutes a dramatic expansion in the scope of criminal forfeiture, an expansion which should be supported by legislative enactment before being adopted by a federal court. Obviously, with the increasing use of criminal forfeitures, application of Pinkerton principles to expand criminal forfeiture beyond the plain language of the forfeiture statutes will be an especially attractive device to federal prosecutors. Accordingly, the legitimacy of this use of the criminal forfeiture laws warrants the review of this Court.

V. This Court Should Grant Review Over the Issue of Whether an Unrebutted Diagnosis of Incompetency is Sufficient to Establish the Probable Cause Needed to Trigger a Competency Hearing Under 18 U.S.C. § 4241 or Due Process.

At the arraignment of Donna Saccoccia, her attorney expressed misgivings to the magistrate concerning the "marked deterioration of in [Donna Saccoccia's] mental status." July 23, 1992, at 27-28. After her conviction, bur prior to her sentencing, the U.S. Probation office filed a

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[4] Indeed, even traditional Pinkerton precedent would require that the government prove the criminal acts of a co-conspirator beyond a reasonable doubt before these acts could be attributed to a conspiracy defendant. United States v. Manzella, 791 F.2d 1263, 1268-69 (7th Cir. 1986). Thus, the government should not, even under Pinkerton, be able to rely upon the alleged crimes of co-conspirators unless these crimes have been proven.

presentence report stating that "it seams apparent that the defendant's mental capacity is diminished." Presentence Report, at 15-16. Just prior to her sentencing, defense counsel moved the court for a competency hearing pursuant to 18 U.S.C. § 4241, and furnished the court with a report from a highly qualified and experienced psychologist, Dr. John Cegalis, in which he diagnosed Donna Saccoccia as incompetent.

Specifically, Dr. Cegalis conducted an intensive examination of petitioner, involving more than a dozen tests and including over 16 hours of sessions with her, as well as interviews with family members and the warden. According to Dr. Cegalis, petitioner's performance on the objective tests was "equivalent to someone who either has brain damage or whose brain is now impaired as a result of depression, anxiety or some other illness." Tr. May 18, 1993, at 44. He found that petitioner suffered, as a result, from impaired memory, meaning that "She can't recall things in the past." Id. at 51. Dr. Cegalis found that petitioner was suffering from a post traumatic stress disorder in the aftermath of major depressions dating back to 1985, and she had personality disorders. Id. at 59. These test results "led [Dr. Cegalis] to conclude that [petitioner] would not be able to sustain a relationship with her attorney." Id. at 58. Further, he concluded that Donna Saccoccia suffered from diminished capacity at the time of her sentencing. Id. at 24. Based upon these and other findings, Dr. Cegalis concluded that petitioner's condition met both alternative standards for incompetency, that is she was (1) unable to understand the nature and consequences of the proceedings against her, and (2) unable to assist counsel in preparing a defense. Id. at 34-37, 78; Report, at 24-25.

The operative statute, 18 U.S.C. § 4241(a), mandates that a trial court grant a motion for a competency hearing "if there is reasonable cause to believe" that a defendant is incompetent. The "question raised by such a motion is akin to probable cause." White v. United States, 470 F.2d 727, 728 (5th Cir. 1972). The government did not present any evidence countering the opinions of Dr. Cegalis, the probation office, or defense counsel. Nonetheless, the trial court denied the motion for a competency hearing after hearing the unrebutted testimony of Dr. Cegalis offered in support of the motion for a competency hearing. The district court held that this evidence was insufficient to meet the requirements of 18 U.S.C. § 4241.

The court reached this conclusion despite the substantial caselaw from other circuits which holds that courts are precluded from reaching the ultimate issue of competency on a motion under 18 U.S.C. § 4241, and rather are limited to the narrow issue of whether a reasonable basis exists for undertaking an evidentiary examination of the competency issue.[5] United States v. Nicholson, 550 F.2d 502, 504 (8th

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[5] The First Circuit apparently misunderstood the procedural history of this matter, as it suggested that the trial court held a "preliminary" competency hearing. Hurley, 63 F.3d at 19.,App. 35a To the contrary, this matter came upon at a sentencing hearing, at which time, the trial court instructed defense counsel to comply with the procedures outlined in 18 U.S.C. § 4244. Tr. May 10, 1993, at 7. Defendant complied with these procedures, and filed a motion for a competency hearing, which motion was heard during defendant's sentencing hearing. Had the trial court actually conducted even a "preliminary" competency hearing, as the First Circuit suggested on appeal, the burden would have been placed upon the government to prove defendant's competence. United States v. Billingsley, 766 F.2d 1015, 1022 (7th Cir. 1985); United

Cir. 1977), cert. denied, 434 U.S. 998 (1977); Rose v. United States, 513 F.2d 1251, 1255 (8th Cir. 1975): White v. United States, 470 F.2d 727, 728 (5th Cir. 1972).

The First Circuit affirmed the trial court, finding largely that petitioner had failed to demonstrate "any specific problems with Donna Saccoccia's assistance during trial." Hurley, 63 F.3d at 19, App. 35a. Moreover, although the First Circuit recognized that a defendant's claim of incompetence cannot be waived by defense counsel, Hurley, 63 F.3d at 18, App. 34a, it placed special importance upon "the silence of defense counsel on this point during the trial." Id. at 19, App. 35a. This begs, of course, the operative question of whether defendant was competent to be sentenced, a matter which was timely raised before the trial court. In any event, the First Circuit engaged in precisely the type of pre-judgment on the issue of competency which the statute precludes: the only issue is whether there was sufficient evidence to raise a doubt as to defendant's competency. See, e.g. United States v. Crews, 781 F.2d 826, 833 (10th Cir. 1986) (competency hearing required when some evidence to create doubt on the issue).

The First Circuit candidly admitted that "This is a close issue." Hurley, 63 F.3d at 18., App. 34a The thrust of the statutory scheme for ferreting out the incompetent from our penal system, and the core notions of due process which

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States v. Makris, 535 F.2d 899, 906 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977). The government adduced no evidence of defendant's competency at the sentencing hearing, and hence had this actually been a "preliminary competency hearing," the government would not have met its burden of proving defendant competent.

underlie it, mandates that close cases be resolved based upon a hearing, indeed a hearing at which the government bears the burden of proof to establish competency. United States v. Billingsley, 766 F.2d 1015, 1022 (7th Cir. 1985); United States v. Makris, 535 F.2d 899, 906 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977). Here, the First Circuit erred in holding that, under this record, the district court properly addressed and concluded that defendant was competent in the context of passing upon a motion under 18 U.S.C. § 4241(a) for a competency hearing. Contra United States v. Nicholson, 550 F.2d 502, 504 (8th Cir. 1977), cert. denied, 434 U.S. 998 (1977); Rose v. United States, 513 F.2d 1251, 1255 (8th Cir. 1975): White v. United States, 470 F.2d 727, 728 (5th Cir. 1972).

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that her petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

UNITED STATES of America, Appellee,
v.
Vincent **HARLEY**, Defendant, Appellant.

UNITED STATES of America, Appellee,
v.
Carlo **DEMARCO**, Defendant, Appellant.

UNITED STATES of America, Appellee,
v.
James **SACCOCCIO**, Defendant,
Appellant

UNITED STATES of America, Appellee,
v.
Stanley **CIRELLA**, Defendant, Appellant.

UNITED STATES OF America, Appellee,
v.
Kenneth **SACCOCCIO**, Defendant,
Appellant

UNITED STATES of America, Appellee,
v.
Stephen **PIZZO**, Defendant, Appellant.

UNITED STATES OF America, Appellee
v.
Donna **SACCOCCIA**, Defendant,
Appellant.

UNITED STATES of America, Appellee,
v.
Anthony **DEMARCO**, Defendant,
Appellant.

Nos. 93-1511,93-2206,94-1508,93-1560,93-1563,93-1616,93-1617,93-2207,94-1507 and 94-1388.

Heard February 2, 1995
Decided July 24, 1995

SELYA, CYR, and BOUDIN, Circuit Judges.

1. BACKGROUND

The eight appellants are Donna Saccoccia (wife of Stephen), her brother Vincent Hurley, James Saccoccio and his brother Kenneth Saccoccio, Carlo DeMarco and his brother Anthony DeMarco, Stanley Cirella and Stephen Pizzo. Along with Stephen Saccoccia and others, appellants were indicted on November 18, 1991, and were charged with conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act. ("RICO"), 18 U.S.C. § 1962(d). Certain of them were also charged with substantive counts of money laundering, 18 U.S.C. §1956-57, currency reporting offenses, 31 U.S.C.§ 5324, and interstate travel in aid of racketeering, 18 U.S.C. §1952.

One conspirator originally charged, David Izzi, pled guilty before trial and testified for the government. Stephen Saccoccia was severed and tried separately due to the illness of his counsel. Alfred Gabriele, added as a conspirator in a superseding indictment, was also tried separately, and his appeal is still pending. United States v. Gabriele, No. 94-1215 (1st Cir.). The end result was that the eight appellants in this case were tried together in the district court in Rhode Island. Trial began on November 6, 1992, and ended in a jury verdict on December 18, 1992.

At trial, the government's evidence consisted primarily of the testimony of other participants in the money laundering activities, of Colombian nationals involved in the international drug trade, and of bank employees. The government also offered bank records of financial transactions and numerous

court ordered wiretap recordings. Viewed in the light most favorable to the verdicts, United States v Valerio, 48 F.3d 48, 63 (1st. Cir. 1995), the evidence permitted a reasonable jury to find the following.

Stephen Saccoccia owned and controlled a number of precious metals businesses, including Saccoccia Coin Company in Cranston, Rhode Island ("Saccoccia Coin"); Trend Precious Metals in Cranston and in New York, New York ("Trend "); and International Metal Marketing ("International Metal") and Clinton Import/Export in Los Angeles, California ("Clinton Import/Export "). In the late 1980's, after some indirect dealings, Stephen Saccoccia began laundering drug money for Duvan Arboleda, a Columbian narcotics dealer. The laundering operation, ultimately expanded to serve a second drug ring as well, took several forms but each began with Stephen Saccoccia receding large amounts of cash in New York, generated from the sale of cocaine. Often, Saccoccia would send one of his employees, usually unindicted co-conspirator Richard Gizzarelli, to a prearranged location, such as a street corner, to meet a customer's courier. Gizzarelli would bring the cash to the Trend office in New York or to Saccoccia's apartment in New York to count it.

The money then followed two different routes. Some of the cash would be used to purchase money orders or gold; the gold and some of the remaining cash would then be shipped to International Metal in Los Angeles . Much of the rest of the cash-up to $200,000 per day---would be sent to Trend and Saccoccia Coin in Rhode Island, either through armored car service or in the car of a Saccoccia employee.

Once the cash reached Rhode island, it was counted by Saccoccia employees and divided into a number of packets in amounts either greater than or less than $10,000. Most of the cash went to the Trend office in Cranston. Saccoccia employees, directed by Izzi, then drove to local banks where they purchased cashier's checks in amounts less than $10,000 payable to Trend, or cashier's checks in amounts greater than $10,000 payable to companies nominally owned by Hurley. The purpose of these maneuvers - called "smurfing" in law enforcement parlance - was to avoid or minimize the filing of accurate currency transactions reports, which are required by federal law for cash deposits in amounts of $10,000 or more.

Ultimately the local Rhode Island checks would be deposited in, and money from the Hurley accounts sired to, the Trend account at Citizens Bank in Rhode Island. A smaller portion of the cash sent to Rhode Island went to Saccoccia Coin. That cash was used to buy gold without documentation; the gold was then resold to legitimate companies in exchange for checks recorded as payments for gold sales. Some of the cash was also used in the ordinary operations of the Saccoccia Coin Shop, a heavily cash-based enterprise.

At the Los Angeles end, the gold sent to International Metal was sold, and the proceeds were wired back to the Trend account at Citizens Bank. Cash received by International Metal was used to purchase gold covertly, the gold was then sold, and the proceeds were also wired to the Trend account. Thus, the bulk of the cash that Saccoccia sent out of New York eventually ended up in the Trend account at Citizens. Citizens Bank closed the Trend account in April 1991. Thereafter, cash was still transported from New York and "smurf" employees in Rhode Island still obtained cashier's checks from various

banks, but the checks were sent to International Metal and Clinton Import/Export in Los Angeles.

Donna Saccoccia assisted her husband in most aspects of the operation, relayed his instructions to the others and wired funds abroad to Colombian banks. Hurley and Anthony DeMarco picked up cash from couriers in New York and transported it to Rhode Island. Hurley, Anthony and Carlo DeMarco, Kenneth and James Saccoccio, Cirella and Pizzo received the cash deliveries in Rhode Island, counted the money, and separated it into packets of smaller amounts for transport to local banks. Anthony DeMarco and James and Kenneth Saccoccio bought the bulk of the cashier's checks.

A staggering amount of money moved through this laundering operation. Between March 1, 1990, and August 22, 1991, Stephen or Donna Saccoccia wired over $136 million to foreign bank accounts primarily in Colombia; more than $97 million of this amount was wired from the Trend account in Citizens Bank jointly controlled by Donna and Stephen. Apart from the $136 million, substantial sums were retained by the Saccoccias and their employees as compensation.

All eight appellants were convicted of RICO conspiracy. All but Carlo DeMarco and Pizzo were convicted were convicted of substantive offenses. After post-trial motions, appellants were sentenced in May 1993, and forfeiture judgments against each appellant were entered pursuant to the RICO forfeiture statue, 18 U.S.C. § 1963, and in some cases under the money laundering forfeiture statute. 18 U.S.C. § 982. Appellant's substantive convictions (in addition to RICO conspiracy), their sentences, and their forfeiture amounts are listed on the following pages:

NAME	SUBSTANTIVE CONVICTION	SENTENCE	FORFEITURE AMOUNT
Donna Saccoccia	13 counts of money laundering (19 U.S.C. § 1956), and 47 counts of unlawful transactions (§ 1957).	14 yrs., 2 yrs. Supervised release	$136,344,231.86
Vincent Hurley	1 count structuring (31 U.S.C. § 5324(3), and 1 count of interstate travel in aid of racketeering (18 U.S.C. § 1952).	18 yrs.,. 3 yrs. Supervised release	$136,344,231.86
Kenneth Saccoccio	14 counts of structuring	12 yrs., 3yrs. Supervised release	$ 37,456,100.79
Stanley Cirella	1 count of structuring	9 yrs., 2 yrs supervised release	$ 37,456,100.79

Anthony DeMarco	5 counts of filing false currency transaction reports (31 U.S.C. § 5324(2); 2 counts of structuring	7 yrs., 3 yrs. Supervised release	$ 136,344,231.86
Carlo DeMarco	No substantive conviction	6.5 yrs., 2 yrs. Supervised release	$ 3,927,357.55
Stephen Pizzo	No substantive convictions.	8.5 yrs., 3 yrs. Supervise release	$ 37,456,100.79

These appeals followed.

II. THE RICO ISSUES

The RICO conspiracy offense charged in this case required the government to prove an agreement by appellants "to conduct or participate...in the conduct of [an] enterprise's affairs through a pattern of racketeering activity "; and the pattern alleged in this case required proof of two or more criminal acts by an appellant (e.g. money laundering or structuring). See 18 U.S.C. §§ 1961(1), 1962(c), (d). Appellants here challenge the indictment, the instructions and the evidence relating to RICO.

A. The RICO Indictment

[1] The RICO conspiracy count alleged the formal requisites of the offense including the assertion that each

appellant agreed to commit at least two racketeering acts; but it did not specify which predicate acts each appellant committed or agreed to commit. Hurley, Cirella, Pizzo and Carlo DeMarco argue that his lack of specificity is fatal to the indictment because a sufficient indictment must "fairly inform [ ] a defendant of the charge against which he must defend..." Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 l.Ed.2d 590(1974).

In count I, the indictment identified the enterprise, its precise methods of operation, the role played by each appellant, and the nature of the predicate acts charged. In appended lists specifically referenced in count I, the indictment also set forth thousands of individual bank transactions and wire transfers. What was lacking was any identification of the particular transactions in which the four complaining appellants were involved, since they acted mainly as counters and subdividers of money deposited and transferred by others.

But if a defendant were charged with conspiring to distribute drugs, it would surely be enough to show that he had acted as a packer in the drug-making "factory' during the period in which a series of identified shipments were made. The government might never know which particular shipments had been packed by the defendant; but his agreement to participate in distributing multiple shipments could fairly be inferred. The same principle applies in this case. There is, we note, no indication that appellants were misled or left in ignorance about what the government intended to prove.

United States v. Winter, 663 F.2d 1120 (1st Cir.1981), cert. denied, 460 U.S. 1011, 103 S.Ct. 1249, 1250, 75 L.Ed.2d 479 (1983), relied on by appellants, is not in point. In that case

we held that the indictment of two defendants failed because "a RICO conspiracy count must charge as a minimum that each defendant agreed to commit two or more specified predicate crimes." Id. At 1136. In Winter the indictment did not charge even in the most general terms that certain defendants had agreed to commit two predicate acts. Here, the indictment did so charge, and Winter is not in point.

B. The RICO Instructions: "Conduct or Participate"

The gravamen of the underlying offense is "to conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs" through a pattern of racketeering activity. 18 U.S.C. § 1962(c). In Reeves v. Ernest & Young, U.S. , ____, 113 S.Ct. 1163, 1172, 122 L.Ed. 2d 525 (1993), the Supreme Court interpreted the words "conduct or participate" and held that they require the defendant's "participat[ion] in the operation or management of Th enterprise itself." Reves involved a civil RICO suit against an outside accounting firm hired to audit the books of an allegedly corrupt enterprise. Construing Reves, we held in United States v. Oreto, 37 F.3d 739, 750 (1st Cir. 1994), cert denied, U.S. , 115 S.Ct. 1161, 130 L.Ed.2d 1116 (1995), that insider employees who are "plainly integral to carrying out" the racketeering activities fit within section 1962(c).

[2] Here, appellants claim that the district court's instruction on the meaning of "conduct or participate" was erroneous in light of Reves. No objection to the instruction was made at trial, so we review only for "plain error," Fed.R.Crim.P. 52(b), which requires appellants to show that an error was made, the error was clear or obvious, and the error resulted in prejudice - that is, it affected the defendant's

substantial rights. United States v. Olano, ___ U.S. ___, ___, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993). Even then, an appeals court need not notice the error unless it caused "a miscarriage of justice" or undermined "the fairness, integrity or public reputation of judicial proceedings." Id. at ___, ___, ___, 113 S.Ct. At 1778-79.

[3] The instruction in this case was similar to the one we upheld in Oreto. 37 F.3d at 750. The difference - which appellants deem crucial - is that the Oreto instruction encompassed defendants who perform acts "necessary to or helpful in the operation of the enterprise," whereas the instruction in this case encompassed defendants who perform acts "related to the operation of the enterprise." Appellants argue that the court's language embraced precisely the view Reves rejected: "that almost any involvement in the affairs of an enterprise [satisfies] the 'conduct or participate' requirement." Reves, ___, U.S. at ___, 113 S.Ct.. at 1169.

In the abstract, the relatedness reference might pose a problem if a defendant were arguably an outsider, such as the independent auditor in Reves. But in this case the government's version of the evidence placed appellants squarely in the role of employees of the enterprise. The jury's verdict shows that the jury accepted that version of events, making the alleged ambiguity in the instruction harmless. To the extent that appellants are challenging Oreto's reading of Reves, Oreto is the law of this circuit. See United states v. De Jongh, 937 f.2d 1,6 (1st cir.1991)(newly constituted panels bound by prior panel decisions in point).

C. The RICO Instructions: Knowledge

[4] Appellants complain about two aspects of the district court's instructions on knowledge. First, they challenge the use of a general "willful blindness" instruction and the court's refusal to instruct the jury that willful blindness did not apply to the RICO conspiracy count. They say that one cannot simultaneously be willfully blind to a conspiracy and also intend and agree to join the conspiracy.

The district judge first instructed the jury on the substantive counts. He then gave a detailed explanation of the RICO conspiracy count, including the requirement that the government prove both "an intent to agree" and "an intent to commit the substantive offenses that are the objects of the conspiracy." The judge told the jury that they could not infer knowledge of the conspiracy from negligence, mistake or ignorance; instead, the defendant must act "voluntarily and intentionally." After lengthy instructions on the RICO count, the judge moved on to more general propositions. Only then did he give the "willful blindness" instruction:

> In deciding whether a Defendant acted knowingly, you may infer that the Defendant had knowledge of a fact if you find that the Defendant deliberately closed his eyes to a fact that would have been obvious to him.

The willful blindness instruction appears to have been aimed at the "knowing" requirements of substantive counts. E.G., 18 U.S.C. § 1956 (money laundering). Appellants have given us no reason to think that it diluted the express "intent" requirement for the conspiracy count. Here the trial judge adequately guarded against that risk with cautionary

instructions stressing that the defendants must have joined the conspiracy intentionally, see United States v. Brandon, 17 f.3d 409, 451-54 (1st Cir.), cert. denied, _____U.S ___, 115 S.Ct. 80, 81, 130 L.Ed.2d 334 (1994), and we see no way that the jury could have convicted without finding deliberate agreement.

[5] Second, appellants object to the district court's refusal of their request for an instruction that each appellant had to know of the existence and general nature of the enterprise. When this request was made after the charge, it was entailed with other requests and the district court may not have focused on the request or may have thought it had in substance been given. Although nothing in the statute explicitly requires such knowledge, there is some precedent, including a comment from this court, suggesting it is appropriate. See, e.g. Brandon, 17 f.3d at 428; 2 L.Sand, J. Siffert, W. Loughlin & S. Reiss, *Modern Federal Jury Instructions* ¶ 52.04 at 52-39 & comment (1995).

We think that in substance the jury was told, although somewhat indirectly, that appellants had to be aware of the enterprise and its general character in order to be guilty under the RICO conspiracy charge. The court instructed that the first element that the jury had to find was that a conspiracy existed 'to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity." The court subsequently told the jury that the government must also prove "that the defendant knew the conspiracy existed and knew of its unlawful purpose."

Perhaps, in theory one might imagine a defendant who knew of and joined in a conspiracy to conduct an enterprise but

did not know the nature of the enterprise. In this case, however, the government's evidence showed that appellants knowingly engaged in structuring transactions on a n ongoing basis within the framework of Stephen Saccoccia's business venture. Given the evidence accepted by the jury, there is no doubt that appellants knew what they were doing and knew they were doing it within the framework of the Saccoccia organization. If the instructions deviated from perfection, the deviation was assuredly harmless.

D. The RICO Instructions: Single or Multiple Conspiracies

[6] At trial, the government offered evidence of out-of-court statements by several persons whom it characterized as unindicted co-conspirators. The most important were two regional managers of rival drug cartels each of which supplied money to be laundered by Stephen Saccoccia's organization. The district court admitted the hearsay under the co-conspirator exception, Fed.R.Evid. 802(d)(2)(E), pursuant to United States v. Petrozziello, 548 F.2d 20 (1st Cir.1977). The court found that the regional managers were, more probably than not, members of the Saccoccia conspiracy and rendered a final Petrozziello ruling at the close of evidence.

Appellants say first that the two drug ring managers could not conceivably be members of the same conspiracy with each other because the rings were rivals. The government responds that the hearsay exception does not require that the conspiracy used to support the hearsay evidence be the same as that charged, see United States v. Dworken, 855 F2d 12, 24 (1st Cir.1988), and that at the very least that each drug dealer necessarily conspired with the members of the Saccoccia organization. Whether the government's premise of separate

conspiracies is sound or squares with what the district court found is not evident from its brief.

Nevertheless, appellants - who bear the burden on appeal of showing error in the Petrozziello finding - make no serious effort to show that the two drug dealers could not have been part of the same conspiracy; their alleged rivalry is hardly conclusive because it is not necessary that all co-conspirators know of each other's existence, Brandon, 17 f.3d at 428. Whether a conspiracy's customers are also members of the conspiracy is a fact-based question, see United States v. Moran, 984 f.2d 1299, 1303 (1st Cir.1993), and once again appellants make no effort to muster the evidence on this issue, or even to argue it.

[7] Alternatively, appellants argue that the court should at least have given a multiple conspiracy instruction, an argument reinforced - although perhaps only superficially - by the government's defense of the hearsay declarations. The government says that this issue was not raised in a timely fashion and that there was no factual basis for a multiple conspiracy instruction. In declining to give such a charge, the trial judge rested on both of these grounds and found, in addition, that the proposed multiple conspiracy instruction was itself deficient.

The district court could be sustained on any one of these three grounds but we think that untimeliness is sufficient, United States v. Akers, 987 F.2d 507, 513 (8th Cir.1993); Yoffee v. United States, 153 f.2d 570, 576 (1st Cir.1946), and add two further points. First, the request for such an instruction was not made until after government counsel had completed his closing argument, making it impossible for him to address the

jury on this point. Second, the core of the government's case tended to show an overarching conspiracy; and appellants make little effort in their brief to show an overarching conspiracy, and appellants make little effort in their brief to show that multiple conspiracies were a serious possibility.

E. Sufficiency of the Evidence

In reviewing sufficiency claims, we normally consider the evidence "in the light most favorable to the prosecution" and then ask whether the evidence "would allow a rational jury to determine beyond a reasonable doubt that the defendants were guilty as charged." United States v. Mena Robles, 4 f.3d 1026, 1031 (1st Cir. 1993), cert. denied, ___ U.S.___, 114 S.Ct.1550, 128 L.Ed.2d 199 (1994). Although appellants deny that any of them "directed" the enterprise, we rejected this legal premise in Oreto, holding that an employee can "conduct" or "participate" in the conduct of an enterprise by playing an integral role in its operation. 37 F.3d at 750.. By Oreto's test, a rational jury could convict each appellant.

[8-12] Donna Saccoccia relayed her husband's instructions to other appellants on numerous occasions, helped count money, and personally authorized the wire transfer of more than $38 million from the Trend account to foreign bank accounts. Hurley and Anthony DeMarco received and counted the large cash deliveries in New York and helped transport the cash to Rhode Island. James and Kenneth Saccoccio and Anthony DeMarco did most of the legwork involved in money laundering, exchanging millions of dollars in cash for cashier's checks at various banks. Carlo DeMarco traveled to New York and Connecticut to transport the cash; Cirella and Stephen Pizzo received and counted money at the coin shop.

[13] Four appellants that apart from their low levels of responsibility, the evidence was insufficient to show knowledge on their part that the Saccoccia organization was engaged in money laundering or that the money being laundered was derived from narcotics. These claims are made by Cirella, Pizzo and James and Kenneth Saccoccio in order to defeat the showing of predicate acts available to the jury to underpin their RICO convictions. Each of the four says or implies that he was unaware of money laundering but working for what he understood to be a legitimate business.

The jury was entitled to find that these four appellants knew that they were engaged in unlawful money laundering. Stephen Saccoccia discussed with Cirella and Pizzo, among others, how to avoid police detection; and Pizzo and Cirella discussed "washing...the money" and means of avoiding jail. James and Kenneth Saccoccio were involved in so many deposits and manipulative subdivides of funds that laundering was the only plausible explanation. Further, in one instance (July 10, 1990), discussing the division of $54,000 into packages of $9,000 for deposit, James and Kenneth Saccoccio conducted the following (recorded) conversation with Izzi:

> James: 54, I can't do that. He wants me to do $9,000 at every bank, that's stupid!
> (Voices fade out)
>
> James: KENNY, you want me to do 9 at every bank ?
>
> Kenneth: (unintelligible) 454,000 that's the way I been doing it. Use VOGUE, Do VOGUE, (unintelligible).

Izzi: Not all of it, do a couple of TRENDS if you could.

As for the drug-based origins of the cash, the direct evidence of knowledge among the underlings is much thinner since none of the conspirators were directly involved with the narcotics sales. Kenneth Saccoccio is an exception since he was recorded, while counting cash at Trend, referring to it as "drug money"; and in one conversation with Pizzo, Cirella said something that the jury might have taken as referring to the drug origins of the proceeds. In the case of James Saccoccio, the imputation of knowledge of drugs rests on the vast sums involved in the laundering and James' close association with Kenneth.

There are plenty of cash-generating businesses but among those that require the illicit laundering of funds, the funds business is notorious and preeminent. In this case, the evidence showed that narcotics were the source of the cash and that this fact was well known to Stephen Saccoccia and Kenneth Saccocio, among others. We think that a rational jury could conclude that James too knew of the money's origins, either from the size and continuing nature of the deliveries, or from being told that the money came from drugs; and Cirella and Pizzo are a *fortiori* cases.

III. Currency Transaction Report Issues

The Bank Secrecy Act requires domestic banks to report any transactions involving more than $10,000 in cash, 31 U.S.C. § 5313; 31 C.F.R. § 103. The statute also prohibits customers from providing false information for a bank's report.

31 U.S.C. § 5324(2).[1] Further, under the 1986 amendments, "[n]o person shall for the purpose of evading the reporting requirements of [the Act or its regulations]...(3) structure or assist in structuring...(3) structure or assist in structuring...any transaction with one or more domestic financial institutions." Id. § 5364. The most common method of "structuring" is to divide sums of cash into amounts that are either under the $10,000 reporting threshold or into amounts that are larger but still less likely to attract attention.

Structuring is a criminal act, 31 U.S.C. § 5322(a), and a violator is subject to double the fine and sentence if he or she structures while violating another federal law or as part of a pattern of crime. Id. § 5322(b). Appellants Hurley, James and Kenneth Saccoccio, and Cirella were convicted of structuring under 31 U.S.C. §§ 5324(3) and 5322(b), and now challenge their convictions on several grounds.

A. Due Process and Self-Incrimination

Appellants first contend that the reporting requirement violates the Fifth Amendment by requiring them to provide incriminating information to the government abut themselves. The Supreme Court has not directly decided this issue as to bank customers, see California Bankers Ass'n v. Shultz, 416 U.S. 21, 73, 94 S.Ct. 1494, 1523, 39 L.Ed.2d 812 (1074), but every circuit to consider the claim has rejected it on one of several alternative grounds. E.g., United States v. Mickesn, 926 F.2d 1323, 1331 (2d Cir.1991), cert. denied, 502 U.S.

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[1] In Late 1992, Congress recodified sections 5324(1)-(3) without substantive change. Publ 1., 102-550, § 1525(1), 106 State. 3672, 4064 (Oct. 28, 1992). For simplicity, we refer to the earlier codification, under which appellants were indicted and convicted, unless otherwise noted.

1060, 112 S.Ct. 940, 117 L.Ed.2d 111 (1992); United States v. Hoyland, 914 F.2d 1125, 1130 (9th Cir.1990).

[14] In our complex society, individuals are called upon to provide information to the government on countless occasions and under a great variety of circumstances. Where Congress has framed a disclosure requirement narrowly focused upon criminal conduct, the Supreme Court has on occasion struck down such states. Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968); Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965). But where the conduct is not inherently criminal, the Court has upheld the statues even where the reporting could in due course lead the government to uncover criminal conduct. California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971); United States vs Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927).

Byers, the most recent of the cases on point, upheld a California hit and run law that required motorists involved in an accident to halt and provide their names and addresses to authorities. Needless to say, a fair portion of those involved in such accidents may be identifying themselves in situations that could result in criminal jeopardy. But the Court found that the report required was not itself a confessing of criminal conduct, and that the law was directed to all auto drivers in the state rather than a more limited group "inherently suspect of criminal activities." Byers, 402 U.S. at 430, 91 S.Ct. at 1539 (quoting Albertson, 382 U.S. at 79, 86 S.Ct at 199).

Of course, a witness may invoke the Fifth Amendment based on fairly remote risks, *see in re Keve*, 760 F.2d 343, 354 (1st Cir.1985), but reporting statues play a central role in the administration of government (*e.g.*, taxes), and the jurisprudence that governs them has followed a different course. And although the 1986 structuring amendments were aimed at money laundering, see Ratzlaf v. United States, _ U.S. ___, ___ _ ___n. 11, 114 S.Ct. 655, 660-61 n. 11, 126 L.Ed.2d 615 (1940), they reinforce a reporting statute-- the Bank Secrecy Act--that has larger aims including tax and regulatory concerns Many of the reports are filed by legitimate cash-oriented businesses and the report itself is not inherently more incriminating than the accident report upheld in Byers.

[15, 16] Anthony DeMarco makes a different constitutional attack on the statute. He was convicted of five counts of willfully "caus[ing] or attempt[ing] to cause" a bank to file a false report. 31 U.S.C. § 5324(2). The bank report, based on information that the teller secures from the customer, asks "on whose behalf" the transaction is being conducted. Anthony DeMarco told bank tellers that the transactions were being conducted on his own behalf but the evidence showed that they were being conducted for Stephen Saccoccia. Anthony DeMarco claims that the "on whose behalf" language is unconstitutionally vague.

Due process requires that criminal statues define offenses with sufficient clarity that an ordinary person can understand what conduct is prohibited. Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). The "on whose behalf" language is reasonably clear and, on the present facts, plainly pointed to Stephen Saccoccia. The cases DeMarco cites all involve prior versions of the

reporting form, which used different language. E.g., United States v. Murphy, 809 F.2d 1427, 1430 (9th Cir. 1987) ("for whose account"). The current version of the form was promulgated to remedy this ambiguity. United States v. Belcher, 927 F.2d 1182, 1186-88 (11th Cir.), cert. denied, 502 U.S. 856, 112 S.Ct. 170, 116 L.Ed.2d 133 (1991).

B. Instructions: Willfulness

[17] Appellants next agree that the district court erred in instructing the jury on willfulness as an element in a structuring violation. Last year, the Supreme Court rejected the majority view of the circuits and held that for a structuring conviction a defendant must knew that what he is doing is illegal. Ratzlaf, ____U.S. at____ , 114 S.Ct. at 658.[2] The district court's's instruction, given before Ratzlaf, told the jury that, in addition to knowledge, willfulness was required and continued:

> An act is done willfully if its done knowingly and with an intent to do something the law forbids. It requires something more than mere negligence or mistake. It requires proof that a Defendant acted with the purpose of either disobeying or disregarding the law.

No objection was made to this instruction, so we review for plain error. This case does not present the conundrum of a

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[2] Following the Supreme Court's decision in Ratzlaf v. United states, Congress deleted the statutory willfulness requirement for structuring offenses. 31 U.S.C §§ 5322(a), (b), 5324(c); Publ. L. 103-325, § 411, 108 sat. 2160, 2253 (Sept. 23, 1994); see H.R.Conf.Rep. No. 652, 103d Cong., 1st Sess. 147 (1994). This recent change does not affect appellant's appeals.

failure to object followed by a wholly unexpected change of law; one month before the trial in our case, this court had an en ban argument to consider the scienter requirement in the structuring statute. See United States v. Aversa, 984 f.2d 493 (1st Cir.1993) (*en banc*) (anticipating Ratzlaf's result), *vacated,* ___, U.S. ___, 114 S.Ct. 873, 127 L.Ed.2d 70 (1994). In the United States v. Marder, we recently applied the plain error standard to a pre-Ratzlaf instruction, 48 F.3d 564, 572 & n. 5 (1st Cir.,) cert. denied,____, U.S. ____, 115 S.Ct. 1441, 131 L.Ed.2d 320 (1995), as have a number of circuits. E.G., United States v. Retos, 25 F.3d 1220, 1228-32 (3d Cir.1994).

It is not certain that the district court erred at all. Aversa held that "reckless disregard" of the law satisfied the willfulness requirement of the structuring statute. 984 F.2d at 502. The Supreme Court in Ratzlaf referred to Aversa as a case requiring knowledge, ___, U.S .___, at ___ n. 1, 114 S.Ct. at 657 n. 1; and it cited with approval, *id.* at __, 114 S.Ct. at 659, another First Circuit case in which we agreed that a jury could "infer knowledge if a defendant consciously avoided learning abut the reporting requirements." United States v. Bank of New England, N.A., 821 F.2d 844, 855 (1st Cir.) cert., denied, 484 U.S. 943, 108 S.Ct. 328, 98 L.Ed.2d 356 (1987).

Ratzlaf did not formulate any precise instruction. Should the Supreme Court address the issue again, it might insist on actual knowledge and nothing less. But "disobey or disregard" is part of a standard instruction on willfulness. *See* 1 L. Sand, *supra,* ¶ 3A.01 AT 3a-18. *See also* United States v.Oreira 29 F.3D 185, 188 (5th Cir.1994) ("disobey or disregard accords with Ratzlaf). Further we are dealing at this pint with nuances in language, and state of mind is usually based on inference rather than on direct evidence. The

instruction in this case, if error at all, is neither plain nor the cause of a miscarriage of justice.

C. Count 67

Hurley and Cirella were convicted of structuring while violating another federal law or as part of a pattern of illegal activity involving more than $100,000 within a 12-month period. 31 U.S.C. §§ 5322(b), 5324(3). The indictment charged that they, together with James and Kenneth Saccoccio, structured a set of six bank deposits of $8,000 to $9,000 each in several different bank accounts on October 21, 1990. The indictment said:

> [T]he defendants structured, assisted in structuring and attempted to structure and assist in structuring the transaction by dividing a quantity of currency in excess of $10,000 into two or more portions and usually those smaller portions and using those smaller portions to purchase cashiers checks or other instruments in amounts under $10,000 at two or more financial institutions on the same day.....

The evidence at trial showed that on October 2, 1990, Izzi told Hurley and Cirella to give him $35,000 in $10 bills and later in the day to give Kenneth Saccoccio $30,000 in $20 bills. Bank records showed that after the conversation and later that day Kenneth Saccoccio made two $9,000 transactions. The jury convicted Hurley and Cirella on count 67, and on appeal they raise a bevy of arguments.

[18] The first argument is based on the fact that the trial judge, without objecting, instructed the jury that strutting can occur either by dividing a sum over $10,000 into deposits under that figure deposits under that figure or by dividing the original

sum into amounts that are over $10,000 but reduce the reportable amount. Appellants read the indictment language as limiting the offense to the "under $10,000" theory and argue that the "over $10,000" theory permitted the jury to convict on a different theory of the offense, impermissibly causing a constructive amendment of the indictment. *See, e.g.*, United States v. Atisha, 804 F.2d 920, 927 (6th Cir.1986), cert. denied, 479 U.S. 1067, 107 S.Ct. 944, 93 L.Ed.2d 1003 (1987).

The apparent strength of the argument is that the taped evidence showed these two appellants being told to assemble amounts over $10,000 and the "over $10,000" instruction appears to dovetail with this evidence. But the "over $10,000" instruction was a general one, describing one method of structuring, and had nothing in particular to do with count 67. Further, the "over $10,000" theory fit those instances (involving DeMarco, Kenneth and James Saccoccio) where a deposit occurred that was over 410,000 but less than the original sum. On the other hand, the only deposits alleged in relationship to count 67 were under $10,000.

Thus, reading the instructions in relation to evidence, we think that the jury had to understand that the government's case on count 67 amounted to this: Hurley and Cirella, to facilitate specified unreported deposits of under $10,000 on October 2, provided larger sums (as directed) in aid of and with the expectation that they would be subdivided into amounts under $10,000 to avoid reports and then deposited, as in fact they were. The practice of giving general instructions in multiple count cases, and letting the jury sort out their application according to the facts, is common and permissible.

Given this interpretation of what happened, we have no reason to consider whether there would have been a constructive amendment rather than a variance if the jury had been instructed to apply the "over 410,000" theory to count 67. *See generally* 3 C. Wright, *Federal Practice and Procedure* § 516, at 26 (2d ed. 1982) (describing distinction as "shadowy"). We do consider, but reject, appellants' claim that the evidence was inadequate to connect their delivery of $30,000 to Kenneth Saccoccio with his later deposits of amounts under $10,000 that day. The timing made the connection a permissible inference.

[19] In a different attack, appellants argue that count 67 was facially defective because it alleged, but failed to specify, the other federal law concurrently violated or the pattern of illegal activity involving over $100,000 within 12 months. This additional allegation was not needed to prove the violation but was needed to trigger the enhanced penalty provided by section 5322(b). Appellants rely on United States v. Hajecate, 683 F.2d 894, 901-02 (5th Cir.1982), cert. denied, 461 U.S. 927, 103 S.Ct. 2086, 77 L.Ed.2d 298 (1983), where the Fifth Circuit overturned a structuring conviction because the structuring count did not specify the other illegal act or pattern.

Here, count 67 did incorporate by cross reference the 22 introductory paragraphs of count 1 where the government described the smurfing operation in detail, identified the role of each appellant, and noted that large volumes of cash were involved. Hurley and Cirella had to know that the pattern of illegal activity alleged by the government was the vast smurfing enterprise of which count 67 was but a single example. Cross references are permissible in indictments. United States v. Yefsky, 994 F.2d 885, 894 (1st Cir. 1993).

there is no showing that either appellant was prejudicially misled.

D. Counts 54-68

[20, 21] Kenneth and James Saccoccio make a more promising attack on their own convictions for structuring. They say that here is sufficient evidence that they knew structuring to be illegal, as Ratzlaf required, and that they were thus entitled to judgments of acquittal. In Ratzlaf, itself, the dissent contended that the majority's knowledge requirement would frustrate the statute; the majority said that reasonable inferences could be drawn. ___ U.S. at ___ n. 19,___ ___ ___, 114 S.Ct. at 663 n. 19, 669-70. Our case presents just his issue.

There is no direct evidence that either appellant knew that structuring was a crime. At the same time, the evidence permitted the jury to conclude that both knew that drug money was involved; that both knew that the break-downs of the cash were designed to disguise proceeds; and that both were paid in proportion to the deposits they made. In addition, Kenneth Saccoccio made a recorded statement indicating that he knew that his own activity was criminal; and given their common role and association a jury could reasonably infer that James had the same level of apprehension.[3]

We think that the thrust of Ratzlaf's willfulness requirement is met if persons engaged in depositing broken

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[3] After hearing that Hurley had encountered a police roadblock, Kenneth Saccoccio said, "Imagine if we went by yesterday." Referring to a day (July 2, 1990) on which he had engaged in various structuring transactions.

down amounts are generally conscious that their laundering operation is illegal, even if they do not know the precise requirements of the law. This circuit in Aversa was the only one to anticipate Ratzlaf and we are fully sympathetic with its aims. But those aims were to screen out persons who structured transactions to disguise amounts in situations where the actor might reasonably have no idea that the course of conduct was unlawful. See Ratzlaf, ____ , U.S. at __ , 114 S.Ct. at 660-61; Aversa, 984 F.2d at 499-500.

Here, there is ample evidence as to Kenneth, and enough as to James, to persuade us that a reasonable jury could find that both knew that their own activities were unlawful. This is not countered, as their brief suggests, by the fact that they generally gave their names and identifying information when requested by banks; couriers in their position could reasonably think that an individual deposit standing alone would not appear irregular, while remaining aware that anyone with a full knowledge of their activities would condemn them.

Ratzlaf dealt with an abstract jury instruction in yes or no terms; and in its wake, courts and juries must ry to answer more concrete questions of how much is enough. Where a defendant's structuring is genuinely innocent of criminal intent, we think that under Ratzlaf a judgment of acquittal is proper no matter how unattractive the context. Cf. Aversa, 984 F.2d at 499-500. But where the context is itself saturated with consciousness of illegality, we do not think that Ratzlaf requires the jury to ignore it in assessing the defendant's state of mind.

IV. MISCELLANEOUS TRIAL ISSUES

A. Donna Saccoccia's Continuance Request

[22] After contesting extradition, Donna Saccoccia was returned by Switzerland to the United States, arriving on July 15, 1992, and was arraigned on that date. The government turned over the bulk of its discovery in late July. In September, her counsel requested a 60-day continuance, he was instead granted 30 days, and trial was set to begin on November 2.

Ten days before trial Donna Saccoccia's attorney asked for another continuance, which was denied. As a result, her team of lawyers had just over 100 days after arraignment to prepare for her trial. Pointing to the length of the government investigation, the number of charges and the quantity of evidence (over 1600 hours of surveillance tape and 10,000 pages of financial documents), Donna Saccoccia claims that the denial of the second continuance was prejudicial error.

Although the government asserts that Donna Saccoccia's counsel were able to prepare during the extradition proceedings, this is at least open to dispute. Still, many of the issues were common to all of the defendants, so that Donna Saccoccia benefited from the work of her co-defendants' counsel., who had eight months to prepare, examine the government's tapes and documents, search for exculpatory evidence and do research. Although a few issues were peculiar to Donna Saccoccia, the common issues bulked large.

Given the broad discretion enjoyed by trial judges, see United States v. Lussier, 929 F.2d 25, 27 (1st Cir.1991)- especially in the complex task of organizing a multi-defendant trial-we have no hesitance in upholding the district court's denial of a second continuance. Her lead counsel appears to have performed ably and thee is no indication of prejudice. The time allowed was generally adequate see United States v.

Waldman, 579 F.2d 649 (1st Cir.1978), and the cases overturning convictions for lack of preparation time involve more several circumstances. E.g., United States v. Gallo, 763 F.2d 1504 (6th Cir. 1985) (RICO count added eleven days before trial), cert denied, 475 U.S. 1017, 106 S.Ct. 1200, 89 L.Ed.2d 314 (1986).

B. Carlo DeMarco's Severance Request

[23] Carlo DeMarco, an employee of Stephen Saccoccia for only about three months, was convicted but not charged of RICO conspiracy but not charged with any substantive offense. Midway through the trial he moved for a severance on the ground that Anthony DeMarco, his brother and co-defendant, would testify on his behalf in a separate trial. Carlo offered the affidavit of his counsel that Anthony would testify (along with a few less important facts) that Carlo "was not to be told anything except that he was working for a gold dealer." The district court held that the motion was untimely and without merit.

In United States v. Drougas, 748 F.2d 8, 19 (1st Cir. 1984), we held that to show an abuse of discretion in these circumstances, a defendant must show that the profit testimony is genuinely necessary, exculpatory, and will in fact be forthcoming in a severed trial. It is doubtful that the affidavit from counsel satisfied this requirement. See United States v. Perkins, 926 F.2d 1271, 1280-81 (1st Cir.1991). In all events, Fed. R.Crim.P. 12(b)(5) specifies that motions to sever must be made where feasible before trial. Defense counsel's claim that he had not previously had a chance to consult adequately with his co-defense counsel is manifestly lame.

C. Minimization of Electronic Surveillance

Cirella, Hurley and Anthony DeMarco moved at trial to suppress the government's recordings made by telephone taps and listening devices installed in Trend and Saccoccia Coin. They charged the government failed to comply with 18 U.S.C. § 251(5), which requires that surveillance shall be conducted "in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter..." We uphold the trial judge's denial of the suppression motion without reaching the question of whether the remedy for a violation would be suppression. See Scott v. United States, 436 U.S. 128, 135-36 n. 10, 98 S.Ct. 1717, 1722 n. 10, 56 L.Ed.2d 168 (1978) (raising but not deciding the issue).

[24, 25] Scott made clear that the statute does not forbid interception of non-pertinent conversations, but requires a reasonable effort to minimize such interceptions. 436 U.S. at 137-40, 98 S.Ct. at 1723-24. Here , the government described the agent's directives to turn off monitoring equipment for irrelevant conversations; it supplied statistics showing that about three-quarters of the time that the agents turned off the monitoring device, they did so because the conversation was deemed non-pertinent; and it pointed to regular reports made to the district court, and to ongoing contacts between the agents and the prosecutors sometimes involving guidance on monitoring. See United States v. Angiulo, 847 F.2d 956, 970 (1st Cir.) cert. denied, 488 U.S. 948, 109 S.Ct. 314, 102 L.Ed.2d 332 (1988).

The Saccoccia enterprise was a widespread and complicated operation in which the illegal conduct was deliberately disguised by the company's legitimate activities.

The conspirators employed code phrases that mimicked industry terminology and used code names for each other, banks and clients. Many of the participants were related by blood or marriage, and incriminating exchanges were often interspersed with personal conversation. It is hard to see how the agents could have done more than make a good-faith determination to turn off recording devices when a conversation was seemingly unrelated to the laundering operation.

Here, as in United States v. Uribe, 890 F.2d 554, 558 (1st Cir. 1989), "[d]efendants [have] offered no evidence tending to show, or even to suggest, a pattern of listening to calls after it became clear that the calls were innocuous." A so-called survey conducted by the son of Hurley's lawyer purported to show that a substantial number of non-pertinent conversations were recorded; but the survey was flawed by his subjective criteria of pertinence (for example, the son classified conversation regarding gold as non-pertinent even though the Saccoccia employees regularly employed gold industry words as code phrases for money laundering transactions). The district court properly disregarded the study.

D. Count 143

[26] Count 143 charged Hurley with a Travel Act violation for transporting $248,000 on a specified date from New York to Rhode Island, to promote specified unlawful activity, namely, structuring and money laundering. Hurley admits that the indictment charged the first tow requisite - interstate travel and intent to promote an unlawful activity. 18 U.S.C. § 1952.

But, he says, there is no allegation that (in the statutory phrase) he "thereafter" performed or attempted an act to further the unlawful activity. Id.

This is a legitimate argument. But we think that the quoted statutory phrase must be read in light of its apparent purpose; to screen out interstate travel by a racketeer who, however malign his purpose, ultimately does nothing to advance the illegal activity. Here, Hurley's transportation of the money from New York to Rhode Island was a central part of the ongoing laundering operation. The particular trip was not only interstate travel but also comprised - "thereafter" - the delivery of funds for laundering. Accord United States v. Brown, 770 F.2d 768, 772 (9th Cir.) (importation of heroin), cert. denied, 474 U.S. 1036, 106 S.Ct. 603, 88 L.Ed.2d 581 (1985).

Given our reading of the "thereafter" language, there is thus no need to consider whether (as claimed by the government) the general descriptions of Hurley's activities (incorporated in count 143 by reference to count 1) could independently supply a subsequent act. We also think it unnecessary to discuss Hurley's argument that the evidence was insufficient to show that he participated in the particular trip which unquestionably occurred. While Hurley's involvement depended on inferences from different pieces of evidence, the jury was entitled to draw those inferences.

E. Donna Saccoccia's Mental Competence

[27] At Donna Saccoccia's rearraignment on July 23, 1992, her trial counsel made and then abandoned a suggestion that she be examined professionally in relation to her current mental condition. The trial proceeded with no further request for such

an examination or suggestion of incompetency, until---about six months after the trial -- the presentence report alluded to a possible sentence reduction for diminished mentally incompetent and had been throughout the trial.

Two days before sentencing, trial counsel filed a motion seeking a competency hearing, which is required where there is "reasonable cause " to believe that a defendant is "mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a). In a two day preliminary proceeding, the psychologist testified that Donna Saccoccia was able to understand the proceedings but opined that she did not have the ability to assist counsel because of depression, anxiety and passivity. The district court found that a full-scale competency hearing was not required and Donna Saccoccia now appeals that decision.

This is a close issue. The fact that a reputable expert gives his opinion does not resolve the matter, even if there is no countervailing expert evidence on the other side. See Figueroa-Vazquez v. United States, 718 F.2d 511, 5122 (1st Cir. 1983). But here the expert appears to have made a substantial examination and his concerns-although not his specific conclusions-have a degree of support in trial counsel's comment at the arraignment and the concerns expressed in the presentence report. For obvious reasons, competency claims are not subject to ordinary waiver doctrine. Pate v. Robinson, 383 U.S. 375, 384, 86 S.Ct. 836, 841, 15 L.Ed.2d 815 (1966).

On the other hand, the focus of the incompetency claim in this case is upon Donna Saccoccia's ability or inability to assist in her defense. The trial judge had some basis for

doubting whether the psychologist understood the issues in the case well enough to make argument, but far more important is the silence of defendant counsel on this point during the trial. An experienced trial lawyer ought to be the first to notice a lack of cooperation or ability to assist so severe as to raise competency questions. There was no complaint from trial counsel until after trial when the presentence report reawakened counsel's interest in the matter.

Neither at the preliminary competency hearing nor on appeal has counsel been able to point to any specific problems with Donna Saccoccia's assistance during trial. This is not a conclusive objection since (in theory) the impairment might prevent counsel from ever learning of information helpful to the defense; but the generalized character of the claim weakens its force. The district judge, who presided over the trial and the preliminary hearing, is entitled twosome latitude in making judgment on the need for a full-scale competency hearing. United States v. Garret, 903 F.2d 1105, 1116 (7th Cir.), cert. denied, 498 U.S. 905, 111 S.Ct. 272, 112 L.Ed.2d 227 (1990). Having reviewed the transcript of that hearing, we sustain the district court's ruling.

V. SENTENCING ISSUES

A. Ex Post Facto Claim

[28] Under the RICO sentencing guidelines, the district judge properly employed the money laundering guideline in sentencing appellants on the RICO conspiracy count. U.S.S.G. §2E1.1. The money laundering guide line effect at the time of

sentencing increased a defendant's base offense level for money laundering by three levels if the defendant "knew or believed" that the laundered money was the proceeds of narcotics sales. Id. § 2S1.1(b)(1). That provision became effective on November 1, 1991; previously, the increased applied only if the defendant "knew" that the money came from narcotics.

In a claim not raised at sentencing, appellants now argue that the district court erred by applying the new and broader guideline, because (they say) the last actual money laundering offense occurred in April 1991 before the new guideline took effect. See United States v. Cousens, 942 F.2d 800, 801 n. 1 (1st Cir.1991). The government responds that the RICO conspiracy itself continued at least until November 1991, asserting that no ex post facto problem exits where the crime continues after the effective date of a new guideline sentence. E.G. United States v. David, 940 F.2d 722, 739 (1st Cir.) cert. denied, 502 U.S. 989, 112 S. Ct. 605, 116 L.Ed.2d 628 (1991). David can arguably be distinguished, but the issue need not be decided here.

The new guideline language was intended to apply the enhancement to cases in which a defendant "knew" that drug trafficking was involved, but the knowledge turned out to be mistaken because (for example) the operation was a government sting and no real narcotics were involved. See U.S.S.G. app. C, amend. 378 (1994). Here, the money was in fact the proceeds of narcotics trafficking so belief and knowledge were the same thing. A defendant who merely believed the drug proceeds were involved would (because of the correctness of that belief) also know that drug proceeds were involved.

Appellants contend that the district court misinterpreted the phrase "knew or believed" to allow an increase based on a showing that appellants merely suspected or should have known that drug money was involved. We have examined the transcript of the sentencing and reject this conjecture. In some cases, the appellant was shown to have direct knowledge, and in others, knowledge was inferred from circumstances; but in each case a fair reading of the trial court's remarks show that the judge determined that the appellant knew the source of the laundered funds.

Pizzo and James Saccoccio assert that even if the court did not misunderstand the standard, the evidence was inadequate to show that they knew that the laundered money was the proceeds of narcotic sales. As explained earlier in the opinion, the evidence on this point was sufficient. Even apart from Pizzo's disputed reference to "the coke," the volume of funds, the duration, the geographic source, the use of small bills and other circumstances made it entirely reasonable to infer that direct participants in the enterprise knew that the funds were derived from drugs.

B. Other Sentencing Errors

The offense level for money laundering offenses is keyed to the value of the laundered funds. U.S.S.G. § 2S1.1(b)(2). Appellants contend that in various respects the sentencing court erred in determine the value of funds and in determine the varying amounts that it found each individual appellant reasonably had foreseen. U.S.S.G. § 1B1.3(a)(1)(B). These are largely factual issues, reviewable only for clear error. United States v. LaCroix, 28 F.3d 223, 231 (1st Cir.1994). We have examined each of these claims of error and think that the

district court's findings are supportable, and that none involves any issue of law requiring discussion.

[29] Something closer to an issue of law is presented by the district court's determination that Carlo DeMarco was entitled to a tow-level reduction as a minor participant rather than to the four-level decrease as a minimal participant. See U.S.S.G. § 3B1.2. The issues arises because DeMarco participated for only a few months in the RICO conspiracy and was held responsible for only $3.9 million of the $139 million conspiracy. But as to that segment of the conspiracy, the court fond that the range of DeMarco's activities made him a minor rather than a minimal participant.

On appeal DeMarco argues that he was entitled to have his role determined in light of the entire conspiracy. The government argues that his role should be measured only against the foreseeable conduct for which he has been held responsible. No case law discussing this issue has been cited. But we think that common sense permitted the district judge to determine that DeMarco-who participated quite actively in several roles over a significant period and was involved with a substantial amount of laundered funds-was a minor and not a minimal participant.

VI. FORFEITURE ISSUES

Between January 1990 and April 1991, Stephen and Donna Saccoccia wired $136,344,231.86 to foreign bank accounts apparently controlled by Columbian drug suppliers. In the indictment, the government took the position that each appellant was jointly and severally liable for this amount under one of RICO's several forfeiture provisions, 18 U.S.C §

1963(a)(3). This subsection requires a defendant to forfeit "any property constituting, or derived from any proceeds which the person obtained, directly or indirectly, from racketeering activity..." Id. By special verdict, the jury imposed such a forfeiture in this amount on Hurley, the other appellants having waived a jury trial on forfeiture issues.[45]

The district court imposed separate forfeitures on the on the appellants. United States v. Saccoccia, 823 F.Supp. 994 (D.R.I.1993). The court held that proceeds under section 1963(a)(3) included laundered funds obtained by an appellant even though later passed along to the Colombians, and that each appellant was responsible for funds foreseeable obtained by other co-conspirators. The court found that Hurley, Stephen and Donna Saccoccia, and Anthony DeMarco were aware of most or all aspects of the conspiracy and liable for the full amount; that the Saccoccia brothers, Cirella and Pizzo were aware mainly of the Rhode Island operation and therefore liable only for the $37,456,100.79 laundered through Trend and Saccoccia Coin; and that Carlo DeMarco, active only from August through November 1991, was responsible for $3,9278,357.55 that he had deposited or otherwise known about.

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[4] The jury also imposed a separate forfeiture on Hurley of $52,800 under the money laundering provision, 18 U.S.C. § 982, in connection with a reporting violation. Neithewr this nor other section 982 forfeitures imposed on three other appellants by the district judge have been challenged on appeal except on grounds identical to those discussed below in connection with the RICO forfeitures.

After appellants filed notices of appeal, the government filed a motion seeking forfeiture of substitute assets, 18 U.S.C. § § 982(b), 1963(m); following various proceedings, the district court ultimately determined that because the $136 million had been transferred out of the jurisdiction, each appellant was liable to pay the amounts in question out of any other assets of that appellant. Both the original forfeiture orders and their extension to substitute assents are the subject of a number of attacks in this case.

A. "Proceeds....Obtained

[30] The opening question is whether the$136 million wired to the Colombians constituted, at least as to the appellants who handled or controlled these funds before they were wired, "any property constituting, or derived from any proceeds which the person obtained, directly or indirectly, from racketeering activity...in violation of section 1961" 18 U.S.C. § 1963(a)(3). Appellants argue that "proceeds:" means net profits, see United States v. Masters, 924 F.2d 1362, 1369-70 (7th Cir.) (Semble), cert. denied, 500 U.S. 919, 111 S.Ct. 2019, 114 L.Ed.2d 105 (1991), in which case $136 million vastly overstates the 5 to 15 percent commission apparently retained by the Saccoccias and the (presumably smaller) amounts passed along to other appellants. Alternatively, appellants contend that none of the $137 million could fairly be regarded as "obtained" by them since it represents amounts transmitted by the Saccoccias to the drug owners themselves.

Section 1963(a)(3) was added by Congress to other RICO forfeiture provisions in 1984, and its legislative history explains without qualification that "the term 'proceeds' has been used inlieu of the term 'profits' in order to alleviate the

unreasonable burden on the government of proving net profits." S.rep. No. 225, 98th Cong., 2d Sess. 199 (1984). In Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983), the Supreme Court made clear its desire for generous construction of the RICO forfeiture provisions, in line with Congress' unusual command that RICO (although a criminal statute) be broadly interpreted. See id. at 27, 104 S.Ct. At 302-03. Given the legislative history and Russello, the broader definition of "proceeds" seems to us a rather easy call.

The point is borne out by imagining that Stephen Saccocia had been caught with the $136 million in cash or gold just before delivering it to the Colombians. The cash or gold could surely be described as property representing "proceeds" which Stephen Saccoccia had "obtained" from racketeering activity in violation of section 1962, namely, through money laundering. As a matter of policy, there is every reason why the booty in that situation ought to be forfeit, and that Congress would desire such a result. See United States v. Lizza Indus., Inc., 775 F.2d 492, 497-99 (2d Cir.1985), cert. denied, 475 U.S. 1082, 106 S.Ct. 1459, 89 L.Ed.2d 716 91986).

The more difficult question is whether property should be regarded as "obtained" by the money launders when it has merely been passed along to its true owner. To read "obtained" to cover property once held by defendant on behalf of another has the effect-when combined with the substitute assets provision-of converting the forfeiture into a fine. Thus, at first, the temptation is to read the word "obtained" narrowly, having unmanned the low level courier who merely transports the money and could face death if any of the funds were diverted.

Yet, on reflection, it is only a degree that the courier who gets a very small cut differs from intermediaries who get a larger one, and from the leader of the drug ring who is effectively paying much of the money back to suppliers and servitors of various kinds. Looking at criminal forfeiture under RICO as a kind of shadow fine, the size of the amount transported is some measure of the potential harm from the transaction. And since temporary custody is certainly enough for a possession charge in a drug case, see United States v. Zavala Maldonado, 23 F.3d 4, 6-8 (1st Cir.), cert. denied, - U.S.-115 S.Ct. 451, 130 L.Ed.2d 360 (1994), it is hard to see why "obtained" should be read more narrowly.

Finally, it is very hard to escape the implications of 18 U.S.C. § 982(b)(2). There, Congress has expressly carved out a narrow safe harbor, which protects against forfeiture a defendant who "acted merely as a intermediary who handled but did not retain the property" unless the defendant conducted three or more separate transactions involving a total of $100,000 or more in a twelve-month period. This provision indicates that Congress itself though that a separate statue was necessary for a "passing on" defense. There is no counterpart safe harbor provision in RICO, nor in view of the amounts involved, could such a provision help any appellants in this case.

B. Vicarious Liability

[31] The question remains whether a defendant himself obtained or whether it extends to funds obtained by other members of the conspiracy. The district court took the latter position with one important qualification: laundered funds

obtained by other members of the conspiracy would be attributed only to the extent that they were reasonably foreseeable to the particular defendant. Saccoccia, 823 F.Supp. At 1004. This is a sensible resolution of a very close issue, and we follow the district court's lead.

The arguments for limited forfeiture solely to funds personally obtained by an individual defendant are several. The statutory language speaks of a violator forfeiting "proceeds" which the person obtained by an individual defendant are several. The statutory language speaks of a violator forfeiting process which the person obtained by vidating section 1962. 18 U.S.C. §1963(a)(3) (emphasis added). In addition, the plight of a defendant who was merely a temporary custodian of cash and passed it on is even starker than that of a person who never possessed the cash at all. Thus, there is a respectable basis for holding that vicarious liability for co-conspirator behavior does not exist under section 1963.

The arguments pointing the other way seem to us stronger. Under established case law, members of a conspiracy are substantively liable for the foreseeable criminal conduct of the other members of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed.1489 (1946). Using the same concept, the Sentencing Guidelines attribute to a defendant at sentencing the foreseeable conduct of co-conspirators. U.S.S.G. § 1B1.3(a)(1)(B). It would be odd, although not impossible, to depart from this principle of attributed conduct when it comes to apply the forfeiture rules, which have aspects both of substantive liability and of penalty.

It is largely fortuitous whether an individual co-conspirator happened to possess the laundered funds at a

particular point. If conclusive weight were given to who physically handled the money, a low-level courier or money counter could be liable for vast sums, while other higher level conspirators could easily escape responsibility. So long as the among handled by others is foreseeable as to as defendant, the foreseeable amount represents the sounder measure of liability.

Finally, we have to give some weight to the fact that each court of appeals that has addressed the topic has concluded that the forfeiture provisions involve joint and several liability. E.g. Masters, 924 F2ed at 1369-70; Fleischhauer v. Feltner, 879 F.2d 1290,1301 (6th S.Cir.1989),cert denied, 493 U.S. 1074, 1109 S.Ct.1122, 107 L.Ed 2d 1029 (1990); United States v. Benevento, 836 F. 2d 129, 130 (2d Cir.1988) United States v. Caporale, 806 F. 2d 1487, 1506-09 (11th Cir. 1986), cert. denied , 482 U.S. 917, 107 S.Ct 3191, 96 L.Ed.2d 679 (1987). This is a somewhat backward way of putting the matter, since "joint and several" roughly describes the result without explaining the underlying theory of liability. Here, we think the theory is the familiar rule that a member of a conspiracy is responsible for the foreseeable acts of other member so for the conspiracy taken in furtherance of the conspiracy. Pinkerton, 328 U.S. at 646-47, 66 S.Ct. At 1183-84; U.S.G. § 1B1.3(a)(1)(B).

Appellants appear to think that their vicarious liability for amounts they did not physically touch rests on the assumption that the Colombian drug lords who ultimately "obtained" $136 million were members of the same conspiracy. On this premise, appellants advance a number of arguments as to why such a conspiracy cannot be made out under the indictment or evidence in this case. The short answer is that the premise is mistaken; individual appellants are liable

because their convicted American co-conspirators obtained the funds, regardless of the status assigned to the Colombians.

Nor do we see any basis for the claim that the forfeiture violates the " excessive fines" clause of the Eight Amendment. Although the provision is applicable to forfeitures, see Alexander v. United States, - U.S. -, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993), holding a defendant liable for an amount of money foreseeable laundered by himself and his own co-conspirators is quite rational based on a proportionality analysis. Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680,115 L.Ed.2d 836 (1991). In this case none of the appellants was separately fined, so we can leave for another day forfeiture imposed on top of separate fines.

We appreciate the fact that a forfeiture penalty can be inflicted when one disallows a passing-on defense then imposes vicarious liability for the foreseeable acts of co-conspirators. The government canceled its $136 million only once but, subject to that cap, it can collect from any appellant so much of that amount as was foreseeable to that appellant. But there is no reason to think that this result is unattractive to Congress , which requested a broad construction of RICO, or to the Supreme Court, which followed this policy in Rusello.

C. Substituted Assets

The indictment in this case sought forfeitures against each of the appellants of approximately $140 million and expressly invoked 18 U.S.C. § 1963 (m). Section 1963 (m) provides that if property subject to forfeit cannot be found or

has been transferred then "the court shall order the forfeiture of any other property of the defendant up to the value of" the property subject to forfeit. 18 U.S.C. § 982 (b) (similar provision in money laundering statute incorporated form 21 U.S.C. § 853 (p). In this case, the original jury verdicts contain a determination of forfeiture only as to Hurley ; forfeiture findings against the other appellants were made thereafter by the district court, as earlier described.

Appellants filed notices of appeal from their convictions in may and June 1993. On July 16, 1993, the government moved in the district court to amend the forfeiture provisions of its judgements to substitute on the property of the appellants for the $137 million in laundered funds. After a hearing, the court granted these motions On appeal, appellants argue that the district court lacked jurisdiction to enter those orders because appeals had already been taken.

[32] This claim rests on the"general rule" that "entry of a notice of appeal divests the district court of jurisdiction to adjudicate any matters related to the appeal." United States v. Distasio, 820 F.2d 20, 23 (1st Cir. 1987). But the rule is not absolute, for even after the appeal is filed the district court retains authority to decide matters not inconsistent with the pendency of the appeal. See Spound v. Mohasco Indus., Inc. 534 F.2d 404, 411 (1st Cir) cert denied, 429 U.S. 886, 97 S.Ct. 238, 50 L.Ed2d 167 (1976). A district court may for example, determine attorneys fees after an appeal has been taken or act in aid of execution of a judgement that has been appealed but not stayed. See in re Nineteen Appeals, 982 F.2d. 603, 609 n. 10 (1st. Cir. 1992); International Paper Co. V. Whitson, 595 F 2d 559, 4561-62 (120th Cir. 1979). We think that the substitution of assents orders fit within this general category.

[33] Criminal forfeiture orders are something of a mongrel. The initial forfeiture is sought in the indictment and absent a waiver of jury trial, is specified in the jury verdict. See Fed. R. Crim p. 7(c)(2); 31(e). But the statue says that an order substituting assets is to be made by "the court". 18 U.S.C. §1963(m). The implication is that such an order may commonly be entered after the initial forfeiture has been determined. Indeed, the government might not even know that substitution is necessary until it seeks to take possession of the property specified in the initial forfeiture order.

Under these circumstances, we see no reason why the taking of the appeal should divest the district court of authority to enter an order forfeiting substitute property. Appellants do no provide any reason to think that this would interfere with, or contradict, the court of appeals; consideration of the judgment of a conviction and sentence, including The initial forfeiture order. Avoiding such interference and inconsistency is the purpose of the general rule barring district court proceedings during the pendency of an appeal. Venen v. Sweet, 758 F2d. 117, 121(3dCir.1985). There is no reason to extend this ban further than its own rationale.

Of course, the substitute assets order, if one is eventually made, may give rise to new issues for appeal, but a new appeal can be taken directly from this order. Similarly, a decision of the appeals court on the original conviction could undermine the substitute assents order (e.g. by overturning the conviction itself or the initial forfeiture), but a substitute assets order can then be undone or overturned. After all, determination of counsel fees in a section 1983 case presents the same problem and is resolved in precisely this manner. See, e.g. Casa Marie Hogar Geriatrico Inc. V. Rivera-Santos,

38, F.3d 615 (1st Cir.1994) (separate appealofcounsel fees subsecquent to originial judgment on the merits).

[34] Appellants's other attack on the substitute assets orders is that those orders countervail the double jeopardy clause, U.S. Conts. Amend. V, and principles of fundamental fairness. Appellant's basic argument is that the original RICO forfeiture orders were limited to forfeitures of the laundered monies and that the orders extending forfeiture to substitute assets constituted either a second prosecution for the same offense or multiple punishments. North Caroline v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076-77, 23 L.Ed. 2d 656 (1969); see also Witte v. United States -U.S. -, 115 S.Ct. 2199, 132 L.Ed 2d 351 (1995).

We found no case law directly in point but see no reason in principle why the substitute assets provision should be regarded either as a second prosecution or as a forbidden multiple punishment . The fact that the substitute assets order may be entered at some time after the original conviction does not make it a second prosecution, anymore than sentencing after conviction is a second prosecution. The substitution order is entered in the original proceeding as one of a number of steps, primarily relating to post-conviction sanctions, that are known to the defendant from the outset

As for the claim of multiple punishment, the Constitution does not prevent multiple sanctions for one offense where the sanctions are specified in advance by Congress and imposed in reasonable proximity to the conviction: a fine and imprisonment is a common federal sentence. The situations in which later increased penalties have been condemned as multiple punishments are quite remote from this case and

involve aggravating elements that are not even arguably present here. Arizona v. Rumsey, 467 U.S. 203, 209-12, 104 S.Ct 2305, 2309, 81 L.Ed 2d 164 (1984)(death sentence); Pearce, 395 U.S. at 723-26, 89 S.Ct at 2079-81(penalty for appeal).

VII CONCLUSION

A number of the remaining arguments made by appellants have been addressed by the court in the decision affirming Stephen Saccoccia's conviction and need not be discussed again. These include attacks on certain references to the Colombians, on the admission of dog sniff evidence, on testimony by Agent Shedd, and on tape excerpts claimed to refer to cocaine and drug money. Similarly, Donna Saccoccia's claims relating to extradition, to the extent not waived, are in substance covered by the earlier opinion's discussion of Stephen Saccoccia's counterpart claims. Several additional arguments (e.g. Kenneth Saccoccio's "theory of the defense" instruction) have been considered but deemed not to require separate treatment.

The charges in this case involved a web of multi-paragraph statues with intricate provisions that the jury had to apply to numerous transactions involving multiple defendants and occurring over a considerable period of time. In these circumstances, we have reviewed appellants' claims not only as individually presented, but also with an eye to making certain that no innocent person has been wrongly enmeshed in criminal proceedings. We are satisfied that while several debatable issues have been raided on appeal, there was no prejudicial error and that the verdict returned by the jury was a just one.

Affirmed.

U.S. Department of Justice
Criminal Division
December 1, 1992

BY TELEFAX
Madame Tania Cavassini
International Legal Assistance Section
Federal Office of Police Matters
Bundesrain 20
CM 3003 Bern, Switzerland

RE: Stephen and Donna SACCOCCIA, FOPM CASE NO. B-85622-CT-139

Dear Madame Cavassini:

This letter is in response to your request for information concerning the charges in the superseding indictment against Stephen and Donna SACCOCCIA.

On or about June 31, 1992, you notified me by telephone that the Swiss Supreme Court had affirmed the judgment of the trial court which granted the United States request for the extradition of Stephen and Donna SACCOCCIA for certain charges lodged against them in the indictment returned by the grand jury in Providence, Rhode Island on November 19, 1991. The Federal Office of Police matters also delivered a note to the United States Embassy in Bern on June 31, 1992 formally notifying the United States government that extradition had been granted.

The note delivered to the embassy indicated that extradition had been granted with regard to Donna SACCOCCIA on all charges except Count Two and with regard to Stephen SACCOCCIA on all charges except Counts Two through Sixty-eight. After I received this information,

I immediately relayed it to Assistant U.S. Attorney Michael Davitt, the prosecutor in Rhode Island. I advised Mr. Davitt that the extradition treaty with Switzerland and United sttes domestic law barred prosecution on all charges for which extradition was not granted. At that time, Mr. Davitt neglected to tell me that was then presenting evidence to the grand jury seeking a superseding indictment against the SACCOCCIAS and their co-conspirators.

On July 22, 1992, the grand jury returned the superseding indictment. Although extradition was not granted for certain offenses, the superseding indictment charged the SACCOCCIAS with all of the charges set forth in the original indictment. When Mr. Davitt later informed me of the superseding indictment, I reminded him that the SACCOCCIAS could not be convicted of the charges for which extradition had not been granted over the objection of the Swiss government.

Mr. Davitt indicated that he had inadvertently failed to delete Stephen and Donna SACCOCCIA as named defendants to the counts of the superseding indictment for which extradition had not been granted because of his unfamiliarity with extradition law. Although he stated that it was not practical for him to obtain another indictment against the SACCOCCIAs, Mr. Davitt said that he had no intention of proceeding against the SACCOCCIAs on those charges at trial. In other words, Mr. Davittindicated that he would present no evidence regarding the guilt of the SACCOCCIAs on the charges for which extradttion was not gratned. Where no evidence of guilt on a charge is presented to thejury at trial, Amercian law requires the judge to direct the jury to find the defendant not guilty.

Even if the prosecution attempts to proceed against a defendant who has been extradited on a charge for which extradition has not been granted, the defendant has an absolute defense to the charge where the extraditing country does not subsequently consent to the prosecution. In such a case, the judge would be required to enter a judgment of acquittal on the charge even if the jury had returned a verdict of guilty.

Even though the superseding indictment includes the charges for which extradition was not granted, there is no possibility under American law that the SACCOCCIAs could be convicted of those charges without the consent of the Swiss government.

I hope you will find this information to be helpful to you in ruling upon the United States requests for waiver of the rule of specialty with regard to the extradition of Stephen and Donna SACCOCCIA. If you have any questions, or if I can be of further assistance to you, please donot hesitate to contact me.

Sincerely,

George W. Proctor
Director
Office of International Affairs
By: Michael E. O'Hare
Trial Attorney

EXCERPTS FROM JURY INSTRUCTIONS

STRUCTURING

A. The Government must prove in order to establish a Defendant is guilty of violating Subsection(3) of Section 5324.

First, it must prove that the Defendant had knowledge of the currency transaction reporting requirements.

Second, that the Defendant knowlingly and willfully structured, assisted in structuring, attempted to structure or attempted to assist in structuring a currency transaction with a domestic fiancial instition.

And third, that the Defendant did so for the purpose of evading the currency transaction reporting requriement of Section 5313 with respect to that transaction.

GENERAL INTENT INSTRUCTIONS:

B. An act is done willfully if it is done knowingly and with an intent to do something the law forbids.

It requires something more than mere negligence or mistake. It requries proof that a Defendant acted with the purpose of either disobeying or disregarding the law.